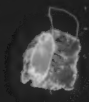
Province of
British Columbia

1984

Report on

Compensation for Non-Pecuniary Loss



LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON COMPENSATION FOR NON-PECUNIARY LOSS

LRC 76

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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To the Honourable Brian R. D. Smith, Q.C.,
Attorney General of the Province of British Columbia

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
COMPENSATION FOR NON-PECUNIARY LOSS

The former Attorney General requested the Commission to examine the "rough upper limit" of $100,000 on damages for pain, suffering and loss of amenities in personal injury actions established by the "trilogy" of Supreme Court of Canada cases in 1978. For reasons set out in the Report, the Commission recommends that the rough upper limit on damages for non-pecuniary loss be abolished.

CHAPTER I INTRODUCTION

A. Introduction

An eye for an eye long ago lost popular support as the theoretical basis for compensating someone injured by another. While revenge may have a pleasant and lingering flavour, it does not alter the fact that the original victim is eyeless.

Legal remedies aim at setting things right. Sometimes the *status quo* can be restored. If A's car is damaged by B, for example, it can be repaired or replaced. Money is an adequate substitute for what has been lost.

There are injuries, of course, for which there is no adequate substitute. Nothing, for example, can replace the missing eye. Money cannot always restore the *status quo*. Nevertheless, where there is no other substitute, the victim must console himself as well as he can with an award of damages.

An important function of damages is to compensate. A plaintiff who has suffered some loss because of a defendant's conduct is awarded damages designed to place him as nearly as possible in the position he would have occupied had the injury not been suffered. Damages may be awarded to punish the defendant, but that occurs only in exceptional circumstances. In other cases, particularly restitutionary actions, awards are not necessarily designed to compensate for some loss. They are measured by the extent to which another has been unjustly enriched. Notwithstanding these exceptions, it cannot be doubted that a major role of damages is to compensate.

Damages may be divided into two general categories. The first category of damages provides compensation for expenses incurred as a result of the defendant's actions, or for expenses likely to arise in the future. These may include injuries to property, doctor's bills, the costs of hospitalization and lost income. These losses are generally referred to as "pecuniary loss." The second category of damages provides compensation for injuries which do not directly touch the plaintiff's pocketbook. These include loss of capacity to enjoy life, diminished life expectancy, and pain and suffering. Often these kinds of losses are referred to as "loss of amenities," or as "non-pecuniary loss."

It is relatively easy to measure pecuniary loss. A person injured in an accident may not have been able to work for several months. Part of his damages should compensate for those lost wages. Maybe he will never work again. Then the courts must resort to actuarial evidence in order to calculate the present value of the lost income, but the award to compensate for that loss, although not precise, is generally quantifiable. Medical expenses up to the date of the hearing are easy to assess. Costs of future care are more difficult, but again, the award can be based upon reasonable assumptions and projections.

Non-pecuniary loss cannot really be quantified. Perhaps the plaintiff has lost an eye or a limb. Perhaps he has suffered paralysis or brain damage. Difficult problems are presented by injuries the ultimate severity of which is not immediately apparent. The loss of one eye, lung or kidney may be painful and debilitating, but is not necessarily disastrous until the other eye, lung or kidney is impaired, something which may or may not occur in the future. It is impossible to say what amount of money will compensate the plaintiff for these kinds of losses. They cannot be accurately quantified. Nevertheless, until 1978, the courts attempted to determine an amount which would notionally place the plaintiff in the position he would have been in had he not suffered his injuries.

That approach had its foundations in antiquity. In the time of King Alfred, over 1000 years ago, "bot" was payable for injuries according to a tariff. The loss of a thumb, for example, was valued at 30 shillings.[1]

In 1978, in a series of cases now frequently referred to as the "trilogy"[2] the Supreme Court of Canada redefined the principles to be applied when assessing compensation for non-pecuniary loss. A "functional" approach was adopted. An award for non-pecuniary loss should not compensate the plaintiff for his injuries, since that cannot be done. Instead it should provide solace for the plaintiff. As before, the courts should continue to consider the type of injury and its gravity, lost amenities, the plaintiff's pain and suffering and its duration. But the controlling factor should be the amount of money necessary to comfort the particular plaintiff in his particular circumstances. These damages should be moderate, and subject to a rough upper limit of $100,000, adjusted for inflation.

Few developments in the law have been accompanied by as much controversy as these changes in the approach to assessing damages for non-pecuniary loss. A host of unanswered questions have been raised which must be resolved through either litigation or legislation. The fairness of, and the need for, a limit on damages for non-pecuniary loss have been questioned. In 1982, the Attorney General referred this subject to the Commission for study.

B. The Working Paper

The Commission circulated a Working Paper on Compensation for Non-Pecuniary Loss in August, 1983. It was tentatively concluded that an upper limit on non-pecuniary loss was desirable since it provided certainty in assessing damages which were objectively unquantifiable. The current upper limit, however, had unexpected and undesirable consequences. Damage awards for all injuries were distorted. That distortion was due, at least in part, to setting the upper limit at an unrealistically low level.

The Commission tentatively proposed that the upper limit be increased to $400,000 as of April, 1983, and thereafter adjusted for inflation. The Commission's proposal was to some extent a compromise between two extremes.

The Working Paper was given wide circulation among members of the profession and judiciary, as well as interested members of the public and law professors expert in this subject. Notices of the Working Paper were circulated to every member of the bar. Requests for copies of the Working Paper were numerous and soon exhausted the Commission's supply. Copies of the Working Paper were forwarded to every law library in the province, and to major law libraries across the country. Consultations took place with representatives of the Insurance Corporation of British Columbia. The Working Paper was considered by the Civil Litigation Subsection, British Columbia Branch of the Canadian Bar Association, and by representatives of the British Columbia Trial Lawyers Association.

A large number of lengthy and thoughtful submissions were made to the Commission on the Working Paper. These submissions divided equally into two camps, one favouring retention of the current upper limit, the other its removal. The Commission's proposal received no support at all.

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[1] Ogus, "Damages for Lost Amenities: For a Foot, a Feeling or a Function?" (1972) 35 M.L.R. 1, 3.

[2] *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, [1978] 1 W.W.R. 577, 8 A.R. 182, 83 D.L.R. (3d) 452, 19 N.R. 50; *Arnold* v. *Teno*; *J.B. Jackson Ltd.* v. *Teno*; *Teno* v. *Arnold*, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272, 83 D.L.R. (3d) 609, 19 N.R.1; *Thornton* v. *Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 3 C.C.L.T. 257, [1978] 1 W.W.R. 607, 83 D.L.R. (3d) 480, 19 N.R. 552. These decisions were all handed down on January 19, 1978. All three were elaborated upon and explained by the Supreme Court in *Lindal* v. *Lindal*, (1982) 34 B.C.L.R. 273, 19 C.C.L.T. 1, [1982] 1 W.W.R. 433, 129 D.L.R. (3d) 263, 39 N.R. 361 (S.C.C.).

A meeting with correspondents representing both points of view was arranged. Arguments on each side were forcefully made. The meeting confirmed the marked division in opinion and made clear that no compromise position would attract support.

These arguments and submissions will be referred to more fully in the balance of this Report.

CHAPTER II COMPENSATION FOR NON-PECUNIARY LOSS

A. Introduction

Any development in the law tends to generate litigation in which the limits of revised principles are tested.The new approach to measuring damages for non-pecuniary loss is no exception. It has been the subject of a significant amount of litigation, in which various questions have been raised. In this chapter we discuss a number of issues arising out of the functional approach to measuring damages for non-pecuniary loss and of the rough upper limit on those damages.

B. What is the Upper Limit?

The limit on damages for non-pecuniary loss is $100,000 measured in 1978 dollars,[1] when the limit was first set by the Supreme Court of Canada in the trilogy. The Supreme Court of Canada also stated in *Andrews* v. *Grand & Toy Alberta Ltd.* that the figure is only a "rough" upper limit, and that in exceptional cases it might be exceeded.

It is, however, difficult to envisage circumstances so exceptional as to justify an award exceeding the rough upper limit for non-pecuniary loss, given the cases which led to the introduction of the limit. For example, in the *Andrews* case, the plaintiff became a quadraplegic. The Supreme Court of Canada ruled that $100,000 was sufficient compensation for non-pecuniary loss. In *Lindal* v. *Lindal*,[2] the plaintiff was comatose for almost three months. He suffered extensive brain damage and consequent physical disability. In his diminished state he lacked the capacity to reconcile himself to his condition and suffered serious emotional problems. Fulton J., of the British Columbia Supreme Court, felt that these constituted "exceptional circumstances" and awarded $135,000 for non-pecuniary loss.

The British Columbia Court of Appeal and the Supreme Court of Canada disagreed. Damages for non-pecuniary loss were reduced to $100,000. The Supreme Court of Canada, following the "solace" analysis, concluded that it was not profitable to measure the difference in value between the losses caused by different injuries:[3]

> Mr. Justice Fulton made no reference to functional considerations in making his award of $135,000 for Brian Lindal's non-pecuniary loss. He referred to those passages in *Andrews* which discuss the need for "flexibility" in the assessment of non-pecuniary damages. He concentrated on demonstrating that the plaintiff Lindal was in a worse position than the plaintiffs in *Andrews* and *Thornton*, in concluding that $35,000 was a "reasonable and proper measure" of the difference between Lindal and Andrews and Thornton.
>
> With great respect, in the case at bar, Mr. Justice Fulton appears to have misapprehended fundamentally the significance of the award of a conventional sum of $100,000 for non-pecuniary loss made by this Court to the three plaintiffs in the trilogy. He seems to have assumed that the figure of $100,000 was a measure of the "lost assets" of the plaintiffs in those cases. The issue was seen as one of quantifying and comparing the losses sustained. Once this premise is accepted, the question then becomes whether the plaintiff Lindal has lost more "assets" than did the plaintiffs in the earlier cases. If the answer to this question is in the affirmative, then it naturally follows that Brian Lindal deserves an award of

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[1] *Lindal* v. *Lindal*, (1982) 129 D.L.R. (3d) 263 (S.C.C.); *Blackstone* v. *Patterson*, (1982) 35 B.C.L.R. 231 (B.C.C.A.); *Vander Est* v. *Albert*, [1981] B.C.D. Civ. 3391-01 (B.C.S.C.); *MacDonald* v. *Alderson*, [1982] 3 W.W.R. 385 (Man. C.A.) *cf. Hatton* v. *Henderson*, (1981) 17 C.C.L.T. 252 (B.C.C.A.); *Matheson* v. *Barnes*, [1981] B.C.D. Civ. 3392-02.

[2] (1982) 129 D.L.R. (3d) 263, (S.C.C.). It should be observed that inflation was not a factor in measuring damages in this case. The trial judgment in *Lindal* was delivered in April, 1978, four months after the judgments in the trilogy.

[3] *Ibid.* at 273-4

over $100,000 under the head of non-pecuniary loss. The excess will represent the difference in value between what Lindal has lost and what the plaintiffs Andrews and Thornton have lost.

The difficulty with this approach is with the initial premise. The award of $100,000 for non-pecuniary loss in the trilogy was not in any sense a valuation of the assets which had been lost by Andrews, Thornton and Teno. As has been emphasized, these assets do not have a money value, and thus an objective valuation is impossible. The award of $100,000 was made, as earlier indicated, in order to provide more general physical arrangements above and beyond those directly relating to the injuries in order to make life more endurable. This is reflected in the fact that an identical sum was awarded to each of the three plaintiffs in those cases, even though their injuries were quite different.

. . . It is true that the Court in *Andrews* spoke of exceeding the limit of $100,000 in "exceptional circumstances." The variety of possible fact situations is limitless, and it would be unwise to foreclose the possibility of ever exceeding the guide-line of $100,000. But, if the purpose of the guide-line is properly understood, it will be seen that the circumstances in which it should be exceeded will be rare indeed. We award non-pecuniary damages because the money can be used to make the victim's life more bearable. The limit of $100,000 was not selected because the plaintiff could only make use of $100,000 and no more. Quite the opposite. It was selected because without it, there would be no limit to the various uses to which a plaintiff could put a fund of money. The defendant, and ultimately, society at large, would be in the position of satisfying extravagant claims by severely injured plaintiffs.

It is apparent, therefore, that there was no justification for exceeding the limit of $100,000 in the case of Brian Lindal. While his injuries were different from those of the plaintiffs in the trilogy, this alone does not justify exceeding the upper limit.

Perhaps an injury involving chronic and severe physical pain would justify an award in excess of the rough upper limit.[4] Quadraplegia, whatever mental distress it may cause, by its nature excludes physical pain. Still, to determine whether someone who will suffer from excruciating physical pain for the remainder of his life should be entitled to more than Brian Lindal, who for the remainder of his life will suffer from the severe emotional problems resulting from his injuries, is to wrestle with imponderables.

C. Effect of an Upper Limit

Following the trilogy, it was held in a number of British Columbia cases that damages for non-pecuniary loss for lesser injuries must be assessed by comparing them to those injuries justifying the upper limit. Damages for non-pecuniary loss were then measured as a proportion of the upper limit.[5] Many people felt that the results obtained from that approach were unreasonable. In cases where a comparative approach has been adopted, it appears that injuries which do not attract maximum damages for non-pecuniary loss are being compensated at a level significantly less than that which prevailed pre-trilogy. In *Duncan* v. *Braaten*,[6] for example, the court said that had the question of damages been at large it would have awarded $40,000 for non-pecuniary loss. In the light of *Andrews*, the award was scaled down to $32,000. In *Boreham* v. *Cruikshank*,[7] Bouck J. was critical of measuring damages for lesser injuries by a comparison with the upper limit. He held that the traditional method should continue to apply except in the most serious cases:[8]

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[4] *See, however, Pharand* v. *Banks*, [1983] B.C.D. Civ. 3391-01 (B.C.S.C.).

[5] *See, e.g., Robson* v. *Official Administrator*, (1979) 12 B.C.L.R. 208 (B.C.C.A.); *Epstein* v. *Wyle*, (1980) 25 B.C.L.R 341 (B.C.C.A.); *Senft* v. *MacGregor*, (1979) 15 B.C.L.R. 76 (B.C.C.A.); *Letourneau* v. *McCoy*, (1980) 21 B.C.L.R. 21 (B.C.C.A.).

[6] (1980) 21 B.C.L.R. 369, damage determination unreported, [1980] B.C.D. Civ. 3385-08; *see also Chow* v. *Grouse Mountain Resorts Ltd.*, [1983] B.C.D. Civ. 3388-08 (B.C.S.C.) where damages for non-pecuniary loss were assessed on the traditional pain and suffering approach.

[7] [1982] B.C.D. Civ. 3400-03; *see also Malone* v. *Chard*, (1982) 34 B.C.L.R. 332 (B.C.S.C.).

[8] *Ibid.*

> The pain and injury method accommodates [persons such as the plaintiff] with a body of law that is generally predictable and harmonious. . .

In *Lindal*, the Supreme Court of Canada held that the comparative approach was wrong. It was inconsistent with the functional approach. *Lindal*, on this point, has been expressly followed in two recent British Columbia decisions.[9]

Abandonment of the comparative approach for assessing damages for non-pecuniary loss arising from lesser injuries has led to different problems. Although less pressure is being exerted on awards for less serious injuries, the general quantum of awards in more serious cases is beginning to approach the upper limit. One of our correspondents observed:

> . . . awards for non-pecuniary loss for relatively minor injuries have gradually increased, while awards for the most serious injuries, such as quadraplegia, have been capped at the $100,000 limit (adjusted for inflation). The gap between awards rendered for serious and minor injuries has diminished resulting, I would contend, in an injustice being perpetrated upon those suffering from the most serious injuries.

In *Ricketts* v. *Johanson*,[10] for example, the plaintiff, who was seriously injured but still able to walk, was awarded the rough upper limit.

Professor Veitch has observed that, although the Supreme Court of Canada has expressly adopted the functional approach, it appears that the courts, including the Supreme Court of Canada, run together the different justifications for calculating damages for non-pecuniary loss:[11]

> The confirmation of the ceiling and the discussion of its suggested manner of alteration still leave us with the question of whether the upper limit is the measure of the worst case imaginable or whether it is to be regarded as a conventional figure attainable by all claimants whose injuries are beyond the modest. One can see from the cases since *Andrews* that many judges, including the Justices of the Supreme Court of Canada in *Lindal* itself, measure awards by comparison. This kind of comparative analysis suggests a calculus in which quadriplegia equates with $100,000. Yet the underpinning of the theory of measurement is the need for solace, the costs and possibilities of obtaining substitutes and the victim's capacity to enjoy them. It is therefore illogical to equate the worst possible injury with the upper limit for reasons of sympathy or the discarded notion of "lost assets". Yet the judgments in both *Andrews* and *Lindal* hint at confusion between theory and practice, while the behaviour of trial judges reveals manifold divergences of approach.

Though the comparative test has been rejected, it is difficult to assess non-pecuniary loss without reference to some standard, even if that calculation is done implicitly. Assessing damages by comparing awards for similar injuries has judicial sanction, in order to establish some uniformity of awards.[12] While it may be futile to match one kind of personal injury against another, in order to compare and derive appropriate awards in individual cases, authorities are useful to establish a general range of awards:[13]

> It is difficult to escape the conclusion that the functional approach, which emphasizes what can be done to alleviate the disaster to the victim and what has been lost, is not too dissimilar from the process of attempting to put a price on happiness. Whether the Court is trying to put a price on the cost of appropriate remedies, which might lead to greater happiness only, or trying to estimate the

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[9] *Penso* v. *Solowan*, (1982) 35 B.C.L.R. 250 (B.C.C.A.); *Leischner* v. *West Kootenay Power and Light Company Limited*, [1982] B.C.D. Civ. 3385-07.

[10] [1983] B.C.D. Civ. 3386-04.

[11] "The Implications of Lindal," (1982) 28 McGill L.J. 116, 125; *see also* Klar, "The Assessment of Damages for Non-Pecuniary Losses," (1979) 5 C.C.L.T. 262, 266-7; McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injury," (1981) 59 Can.Bar Rev. 1, 48-9; K. Cooper-Stephenson & I. Saunders, *Personal Injury Damages in Canada*, (1981) 359-70.

[12] *Crebo* v. *Doberstein*, [1982] B.C.D. Civ. 3359-08 (B.C.C.A.).

[13] W.H. Charles, "The Supreme Court of Canada Handbook on Assessment of Damages in Personal Injury Cases," (1981) 18 C.C.L.T. 1, 18.

> amount of happiness that has been lost, the measurement is a difficult one. By taking the case of seriously injured victims such as paraplegics or quadriplegics, the Supreme Court appears to be saying that $100,000 is the conventional sum set as a guideline for persons requiring the maximum remedial compensation. By implication, all other less serious injuries should be assessed comparatively.

Currently, damages for non-pecuniary loss for less serious injuries are assessed conventionally: that is, by comparison with previous awards with a view to providing the injured person solace, and without reference to the rough upper limit.[14]

It is interesting to note that when the Supreme Court of Canada adopted the functional approach it considered the seminal article on damages for non-pecuniary loss, written by A.I. Ogus.[15] Professor Ogus's proposal to resolve problems of determining non-pecuniary loss consisted of adopting a functional approach with respect to a fixed tariff for injuries:[16]

> The tariff would consist of an exhaustive list of injuries, set out under medical advice with each item presented as a percentage of total disability. . . [The] statutory figure would be variable according to the amount necessary to provide the plaintiff with reasonable solace for his unhappy condition. . .
>
> Some of the consequences flowing from the adoption of this approach would be identical with those resulting from the personal approach; in particular the anomalies of the present law would be removed. But in addition adherence to the functional approach would seem to carry with it one further advantage: by requiring the plaintiff to show that the money awarded would serve a useful function, the doctrine is drawing near to the fundamental notion in the law of damages of *restitutio in integrum*. The award, though it falls short of restoring to the plaintiff the happiness which he has actually lost, attempts the next best thing by supplying him with the means to obtain some alternative pleasure.

Combining the functional approach with a fixed tariff for injuries would provide a remarkable degree of certainty to assessing damages for non-pecuniary loss. Many people, however, are opposed to assessing non-pecuniary loss by reference to a tariff of awards. A tariff cannot take into account special circumstances which may make the plaintiff's injuries more or less significant to him than to someone else similarly injured. It is not clear that a tariff amount, variable in accordance with the functional approach, would meet that concern.

D. How do the Courts Determine a Measure of Damages that will Provide Solace?

Requiring courts or juries to place a value on things that might provide an injured person with solace raises an important question. How is solace determined? Should it be determined subjectively (what would this plaintiff require to comfort him)? Or should it be determined objectively (what would be reasonable solace for most plaintiffs similarly injured)?

If the test is subjective, the seriousness of the injury will not necessarily determine the appropriate measure of non-pecuniary damages. A subjective basis for measuring damages might reward the weak over the more stoic.Consider, for example, two people, similarly active before incurring similar injuries. One is unable to cope with the injuries while the other adapts. The one who cannot cope will, on a subjective test, need more for his solace than the other.

Unequal non-pecuniary damage awards for similar injuries is not a particularly desirable result. Neither are equal non-pecuniary damage awards

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[14] *See, e.g., Penso* v. *Solowan, supra*, n. 9; *Thomas* v. *Curry*, [1983] B.C.D. Civ. 3389-03 (B.C.S.C.).

[15] "Damages For Lost Amenities: For a Foot, a Feeling or a Function?", (1972) 35 M.L.R. 1.

[16] *Ibid.* at 13 and 15-16.

for injuries which are vastly different in nature and degree. A subjective approach to measuring solace would be open to these criticisms, although some of our correspondents were untroubled by these results.

On the other hand, an objective test, while ensuring that similar damages are awarded for similar injuries is not wholly satisfying either. The tragedy which strikes a concert violinist who loses an arm cannot be compared with that of a right handed person who loses his left arm. The loss of an eye will affect more seriously a one-eyed person than it will a person who, before the accident, had the use of both.

If the functional test is to depend upon a subjective evaluation of the plaintiff's needs for happiness, he must devote a substantial amount of time at trial to proving his pastimes and pursuits prior to the accident. He must submit detailed accounts of things which can be bought in replacement. For example, a mountain climber who is now a quadraplegic may assert that he is entitled to the costs of periodic helicopter charters to fly him over his favourite peaks. The example may appear to be extreme, but it indicates the principal question which arises out of the functional approach: what is meant by solace? Money alone is not solace. Solace is measured by what that money can buy. It would appear, therefore, that the functional approach is an invitation to adduce detailed evidence on what might provide the plaintiff with solace. It may represent more than an invitation to introduce such evidence. Perhaps good practice would require it.

One of our correspondents suggested that the courts and the legal profession have not yet come to grips with the functional test as articulated by Dickson J. (as he then was) in the trilogy and reaffirmed in *Lindal*. Since the functional approach is intended to measure loss and not injury, it is necessarily subjective. Damages should be assessed as the amount which will make the victim's life more bearable. That might well result in similar awards for non-pecuniary loss arising from different injuries.

While the Supreme Court of Canada may have intended a subjective application of the functional approach, lower courts have been inconsistent in the approaches they adopt.

If the aim of the functional approach is to provide solace on a subjective basis, a plaintiff who is permanently unconscious would not appear to be entitled to damages for loss of amenities of life. Under the former law, using the conventional approach to measuring non-pecuniary loss, a person rendered instantly unconscious was entitled to damages for loss of amenities,[17] although not for pain and suffering.[18] In a recent British Columbia case, *Knutson* v. *Farr*,[19] MacKinnon J. observed that, logically, the functional test would not permit the award of damages for non-pecuniary loss to an unconscious plaintiff.[20] Nevertheless, he held that he was bound by previous authority:[21]

> The inability of the plaintiff to appreciate the loss suffered is a matter of no relevance and should not be a factor in mitigating or eliminating damages for loss of amenities.

The plaintiff was awarded $77,000 — one-half of the upper limit for non-pecuniary loss, which was calculated at $154,000 taking into account infla-

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[17] *The Queen* v. *Jennings*, (1966) S.C.R. 532.

[18] *Wise* v. *Kaye*, (1962) 1 Q.B. 638 (C.A.).

[19] (1982) 38 B.C.L.R. 291 (B.C.S.C.).

[20] *See also*, *Prather* v. *Hamel*, (1976) 66 D.L.R. (3d) 109 (Alta. S.C.A.D.); *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, (1978) Cmnd 7054, 91-2, paras 393-8; Veitch, "The Pearson Report: Guidelines for Canada?" (1979) 28 U.N.B.L.J. 19; *Andrews* v. *Freeborough*, [1967] 1 Q.B. 1, 12, 18 and 20 (C.A.); *Lim Poh Choo* v. *Camden and Islington Area Health Authority*, [1980] A.C. 174, [1979] 2 All E.R. 910.

[21] *Supra*, n. 19 at 308.

tion. On appeal, the award for non-pecuniary loss was overturned. It is impossible for an award of damages for non-pecuniary loss to provide solace for someone who is permanently unconscious.[22] The Court of Appeal, consequently, applied the functional approach according to a subjective standard. New evidence suggested that Knutson possessed some degree of awareness, although it was minimal. Damages for non-pecuniary loss were reduced to $15,000.

In two recent British Columbia cases,[23] it was held that evidence respecting the cost of providing solace should not be introduced. That position suggests the courts are determining damages for non-pecuniary loss according to an objective standard.

There is, consequently, some inconsistency in the application of the functional approach.

E. To What Kinds of Non-pecuniary Loss do the Functional Approach and the Rough Upper Limit Apply?

Following the trilogy, doubt as to whether the ceiling on non-pecuniary loss applied to lesser personal injuries extended also to the applicability of the rough upper limit to other kinds of non-pecuniary loss. For example, injury to reputation caused by libel or slander is a form of non-pecuniary loss.

In *Vogel* v. *C.B.C.*,[24] the plaintiff was awarded $100,000 for injury to reputation plus $25,000 aggravated damages. The court did not consider whether the rough upper limit on non-pecuniary loss applied to damages for defamation. Whether or not the rough upper limit applied, it might seem anomalous to the lay observer that a man's reputation could be worth $125,000, while a quadraplegic's pain and suffering and loss of amenities was worth only $100,000. Whatever arguments might be raised in favour of a ceiling on such damages, equating these damages has drawn criticism.[25] It should be recognized that a damage award for defamation serves certain social ends that compensation for personal injuries does not. For that reason alone, damages for pain and suffering and damages for defamation are not comparable.[26]

More recently, the Ontario Supreme Court has held that the rough upper limit applies to all forms of non-pecuniary loss.[27] In *Munro* v. *Toronto Sun*, Holland J. concluded that the principles enunciated in the trilogy were not restricted to personal injury actions:[28]

> I have come to the conclusion that it is proper for a Court to consider, in assessing damages arising from libel, the strictures established by the Trilogy and that a comparison between the Trilogy upper level (now with inflation approximately $160,000) and awards for physical injury may be made. I base this conclusion on my acceptance that the relevant principles are the same irrespective of the nature of the tort, that libel and personal injury actions each being based on tortious conduct attract compensatory (not punitive) awards, and that the policy considerations which led the Supreme Court of Canada to impose the upper limit as expressed in the Trilogy apply equally to any non-pecuniary award including the "at large" award in a libel action.

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[22] *Knutson* v. *Farr*, [1984] 5 W.W.R. 315 (B.C.C.A.); in *Wipfli* v. *Britten*, (1983) 22 C.C.L.T. 104 (B.C.S.C.), the plaintiff's limited capacity to enjoy substitutes for his injuries led the court to reduce damages for non-pecuniary loss. That portion of the court's decision was affirmed on appeal: [1984] 5 W.W.R. 385 (B.C.C.A.). Both Mr. Justice Esson (dissenting in *Knutson*) and Mr. Justice Anderson (dissenting in *Wipfli*) were of the view that an objective test should be applied to calculating damages according to the functional approach.

[23] *Supra*, n. 7.

[24] (1982) 35 B.C.L.R. 7 (B.C.S.C.).

[25] *See, e.g.*, B.F. Fraser, "Moderation: The Reality of Non-Pecuniary Damages," (1981) 39 Adv. 315.

[26] *See, e.g.*, *Muirhead* v. *George Outram & Co.*, (1983) 5 L.T. 201.

[27] *Munro* v. *Toronto Sun*, (1982) 21 C.C.L.T. 261 (Ont. S.C.).

[28] *Ibid.* 305.

Whether the arguments raised in support of a ceiling for non-pecuniary loss resulting from personal injuries apply equally to other kinds of non-pecuniary loss is not free from doubt. Moreover, there does not appear to be a need for such a ceiling. With the exception of the *Vogel* case, damages for defamation, for example, have not been generous. One can only speculate whether the *Vogel* case is the forerunner of a revised approach to measuring damages for defamation.

In an annotation[29] to the *Munro* case, it was observed that, since damages for defamation were calculated in a fashion radically different from that used to determine damages for non-pecuniary loss, the principles established by the trilogy were not necessarily appropriate for determining damages for defamation. Moreover, damages for defamation include pecuniary loss, which should not be subject to an upper limit. Lastly, doubt was raised concerning how the functional approach can be applied to measuring damages for defamation:[30]

> If, then, we apply the "$100,000 + inflation" limit only to the non-pecuniary components (loss of self-esteem, embarrassment, and social, as distinct from commercial, shunning of the victim, etc.), all is well. But is it? Surely, if we are to apply the Trilogy limit even in that quarter, we must do so with an eye to the "functional" approach so strongly asserted in *Lindal* v. *Lindal*, and award damages only to such an extent as will provide pleasures or advantages in substitution for one's lost self-esteem etc. The thesis, conceptually difficult in the context of debilitating physical injury, seems incoherent when applied to the loss of one's good name and the esteem of one's acquaintances.

F. What Rate of Prejudgment Interest is Appropriate for an Award for Non-pecuniary Loss?

Generally an award of damages will include an order for interest on that amount calculated from the day of the injury to the time of judgment. An issue has arisen concerning the rate of prejudgment interest which should attach to a judgment for non-pecuniary loss in personal injury cases. The difficulty arises because losses are valued as of the trial date rather than the date the injury was sustained. The judgment reflects any inflation which may have occurred between those two events. The "usual" rate of prejudgment interest (say in the 12% range) has an inflation factor built into it and it is argued that to compensate the plaintiff for pain and suffering in "trial date dollars" and then to award him prejudment interest at the "usual" rate is to compensate him twice for the inflation which has occurred between the date of injury and the date of trial. That was the view adopted by the Manitoba Law Reform Commission in their report on prejudgment interest.

In British Columbia, the trial courts (having a discretion as to the rate of interest) split on this issue.[31] Some award the "usual" rate of interest and others award interest at the 5% "floor" rate. The issue recently came before the B.C. Court of Appeal in *McArthur* v. *Barton*,[32] and that court adopted the "usual" rate of prejudgment interest as appropriate.

Several of our correspondents were particularly concerned with the impact of prejudgment interest on awards for non-pecuniary loss. Cases involving catastrophic injuries may take several years to come to trial. Prejudgment interest on an award for non-pecuniary loss may be a significant

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[29] J. Irvine, (1982) 21 C.C.L.T. 264.

[30] *Ibid.* 266.

[31] *See, e.g.*, *Fitzpatrick* v. *Mann*, [1982] B.C.D. Civ. 3389-02; *Dalskog* v. *Croy*, [1982] B.C.D. Civ. 3385-03; *Hendrikx* v. *Mathers*, [1982] B.C.D. Civ. 3388-04; *cf. Hatton* v. *Henderson*, (1981) 29 B.C.L.R. 317 (B.C.C.A.); *Leischner* v. *West Kootenay Power and Light Company Limited*, [1982] B.C.D. Civ. 3385-07.

[32] (1982) 37 B.C.L.R. 10 (B.C.C.A.).

component of a personal injury victim's award. The basis upon which prejudgment interest should be awarded is a difficult question. Nevertheless, it should not affect the issue of the assessment of damages for non-pecuniary loss any more than it affects the assessment of damages for other losses. Prejudgment interest primarily compensates a recipient of a damage award for the time money he was entitled to was kept from him. We are examining prejudgment interest in a separate project and will not be discussing these issues further in this Report.

G. Other Jurisdictions

Not all Canadian jurisdictions have accepted the upper limit on non-pecuniary damages. Trial courts in various provinces have indicated they will not be bound by it. Professor Charles, in an article published before *Lindal*, observed:[33]

> Some jurisdictions such as British Columbia, Alberta, Manitoba, and Prince Edward Island have accepted the $100,000 guideline, whereas Saskatchewan, Ontario, Newfoundland, and New Brunswick refuse to be bound by it. The province of Nova Scotia has not taken a uniform stand on the matter and, at the moment, has conflicting decisions at the trial level.

Similar observations have been made following the *Lindal* case.[34] Nevertheless, the Supreme Court of Canada has been consistent in applying the upper limit. A trial court judgment, awarding damages for non-pecuniary loss in excess of $100,000, if appealed to the Supreme Court of Canada, will probably be reduced. The likely result of the Supreme Court of Canada's decision in *Lindal* will be the universal adoption of both the functional approach to calculating damages for non-pecuniary loss, and the rough upper limit on those damages.

H. Summary

Although various questions about measuring damages for non-pecuniary loss remain unanswered, the general outline of the law is emerging. Solace appears to be determined objectively (with the exception of calculating damages for a person who is permanently unconscious or who has suffered severe brain damage so that money will not provide solace). The comparative approach to determining these damages has been disapproved, although some sort of comparison with other damage awards and the upper limit appears to be inescapable. The rough upper limit, although adjusted for inflation, has proven an effective lid on damages for non-pecuniary loss. Whether that lid is either desirable or necessary are questions we consider in the next chapter.

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[33] *Supra*, n. 13 at 14-15.

[34] Professor Veitch, *supra*, n. 11 at 120, lists those jurisdictions which have rejected or are ambivalent to the upper limit, or have confused the formulation as: Saskatchewan, Ontario, Newfoundland, New Brunswick, and Nova Scotia.

CHAPTER III ARGUMENTS FOR AND AGAINST THE FUNCTIONAL APPROACH AND THE ROUGH UPPER LIMIT

A. Introduction

As we mentioned earlier, the functional approach to, and the rough upper limit on, damages for non-pecuniary loss have proven to be controversial. In this chapter we examine critically the justifications of the functional approach and the rough upper limit advanced by the Supreme Court of Canada. We will also examine arguments raised for and against the functional approach to measuring damages for non-pecuniary loss and the rough upper limit.

B. Justifications Advanced by the Supreme Court of Canada

The Supreme Court of Canada gave several reasons for adopting the functional approach. First, as mentioned earlier, since the plaintiff's loss cannot be accurately quantified, any award must be, to some extent, arbitrary. If compensation is impossible, setting damages at a level which will provide some comfort, the court concluded, is a sensible approach. Second, high awards for non-pecuniary loss impose an immense burden upon society generally. Higher awards are in part the product of modern medical techniques. Today doctors may be able to keep alive a person who suffers injuries that ten years ago would have been terminal. The result is a whole new class of plaintiffs who will require costly future care and whose non-pecuniary loss, in terms of lost amenities, is massive. Third, the plaintiff's damages for loss of future earnings and cost of future care provide substantial funds to obtain substitutes for lost amenities, suggesting that compensation for non-pecuniary loss should be moderate. The Supreme Court of Canada felt that these reasons also justified an upper limit on damages for non-pecuniary loss of $100,000.

We will examine these points separately.

1. The Plaintiff's Loss Cannot be Accurately Quantified

Certainly it is difficult, and perhaps impossible, to quantify lost amenities. There is no marketplace for pain and suffering. We agree that any award on this head must be essentially arbitrary.

The majority of comment we received was critical of the functional approach to assessing non-pecuniary loss. We have been advised that it presents many procedural difficulties, not the least of which is charging a jury as to the proper use of the functional approach.

Whatever theoretical approach is taken, damages for non-pecuniary loss will be difficult to assess. Whether a value is placed on the loss itself, or on the costs of providing solace for the loss, should not significantly alter the size of awards made for particular injuries. The new approach to assessing damages is helpful, however, in that it focuses the court's attention on the realities involved in assessing damages for non-pecuniary loss.

We do not think, however, that this is an argument for or against an upper limit on damages for non-pecuniary loss. On the need for, or the desirability of, an upper limit this factor is neutral.[1] Moreover, we have doubts whether damages for non-pecuniary loss serve any one narrow purpose. Confining the level of those damages overlooks a number of other kinds of loss for which a plaintiff usually receives no compensation.[2]

[1] *See, e.g., Wipfli* v. *Britten*, (1983) 22 C.C.L.T. 104 (B.C.S.C.), [1984] 5 W.W.R. 385 (B.C.C.A.).

[2] *See, infra*, Chapter III, B., 3.

2. High Awards for Non-pecuniary Loss Impose an Immense Burden upon Society Generally

The rough upper limit was designed, in part, to avoid extravagent awards that, while usually paid by insurers, were inevitably passed onto the public, usually in the form of higher insurance premiums.

The experience in the United States, particularly in the area of medical malpractice, was referred to by the Supreme Court of Canada in the trilogy. High awards appear to be fairly common in the United States and the costs of insurance against those risks is said to be expensive. But how accurate is this view of the American experience, and is it relevant to Canada?

First, a superficial look at the American experience can be misleading. Large damage awards made at trial are often given nationwide news coverage. Minimal attention is paid to decisions reducing excessive awards on appeal. The American practice of specifying the amount of unliquidated damages claimed in the writ commencing action is also misleading. A claim for $20,000,000 in unliquidated damages, for example, might be given wide press coverage, but that figure will bear no relation to the amount awarded at trial. These practices lead to a mythology that the facts may not support.

Second, American damage awards will be significantly higher than British Columbia awards, because the cost of medical care in the United States far exceeds the cost of equivalent care in British Columbia.

Third, the relationship between high damage awards for non-pecuniary loss and insurance costs may be less straightforward than it would first appear. Damages for non-pecuniary loss are often only a small fraction of the total damage award. It has also been observed that the sometimes prohibitively expensive insurance premiums required in the United States are not due solely to high awards but are also the consequence of poor claims control, inadequate standards of practice and financial mismanagement.[3]

We received several submissions that suggested that the Supreme Court of Canada decision was based upon an apprehension of a crisis in the insurance industry and the costs of insurance. No evidence was led on that point. The perception of an insurance crisis was being fostered by a vigorous publicity campaign conducted by the insurance industry. We were provided with photocopies of numerous advertisements placed by the insurance industry, at the time the Supreme Court of Canada was considering its decisions in the trilogy, claiming that high damage awards would lead to prohibitively expensive insurance premiums.

The sponsors of this advertising campaign were challenged in an action in the Superior Court of Connecticut. It was alleged that the advertisements were unfair, deceptive, untrue and misleading.[4] It is our understanding that the advertising was voluntarily withdrawn following commencement of the action.

If a decision is to be taken that someone who has been injured is to be deprived, on the ground of social costs, of any part of compensation recognized and awarded by the law in the past, that decision should rest on a firmer basis than the cursory examination of the experience of another jurisdiction. It is particularly troubling that a misleading view of that experience may have been fostered by an extensive advertising campaign sponsored by interested parties.

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[3] H. Waldock, in an address to the Insurance Law Subsection, British Columbia Branch, Canadian Bar Association, Apr. 15, 1982.

[4] *See New York Times*, 6 Feb. 1978 at B9 and 7 Dec. 1978 at D17.

A wait-and-see stance on this issue might have been adopted by the Supreme Court of Canada, since any study would be based upon assumptions that might or might not come to pass. Perhaps it was significant that the Supreme Court of Canada's position was the product of three cases involving large awards for non-pecuniary loss. Perhaps, in the court's view, an era of extravagent awards had arrived. Even if that was the case, it probably would have been desirable to see what effect those awards had on insurance costs, or to have heard evidence on the probable impact of higher awards for non-pecuniary loss on insurance premiums.

Motor vehicle insurance systems vary from province to province. Whether the American experience would have any validity for any jurisdiction in Canada is a question the answer to which might vary depending upon the insurance scheme prevailing in that jurisdiction.

We have attempted to ascertain the impact higher awards for non-pecuniary loss might have on insurance premiums. The results of that study are discussed later in this Report.

3. Other Heads of Damage Provide the Plaintiff with Substantial Funds

The argument that the plaintiff is provided with substantial funds under other heads of damages, which may be applied to his solace, is probably true only occasionally. For example, the total award, consisting of costs of future care, loss of future income and $100,000 damages for pain and suffering, may be one million dollars. One million dollars is a lot of money, and some of that can probably be devoted to the plaintiff's comfort. What happens, however, if for one reason or another damages for costs of future care and loss of future income are nominal? The plaintiff, in that case, has little in the way of additional funds to provide substitutes for lost amenities, if damages for non-pecuniary loss are inadequate. In a recent case,[5] Bouck J. awarded a plaintiff $425,000 for non-pecuniary loss arising from serious injury, on the ground that the rough upper limit did not apply where damages for lost income and costs of future care were minimal. That case is currently under appeal.

Even where other heads of damages provide the plaintiff with substantial funds it is difficult to justify viewing them as compensation for non-pecuniary loss. Presumably costs of future care will be spent on future care and if accurately estimated there will be no excess funds available for other purposes. Similarly, damages for loss of future income must be used to maintain the plaintiff. A plaintiff would be irresponsible to use those damages to provide substitutes for lost amenities, since he risks impoverishing himself in the future.

We are concerned, moreover, that this argument is based on a simplistic view of what kinds of non-pecuniary losses attract compensation. While these damages ostensibly provide compensation for lost amenities, there are a number of other kinds of expense or loss for which the plaintiff usually receives no specific compensation. Damages for non-pecuniary loss often provide funds to satisfy losses which are not recognized as heads of damages.

For example, one reason why American damage awards for non-pecuniary loss are higher than in British Columbia may be because a litigant in the United States is often responsible for his own legal costs, notwithstanding the outcome of the litigation. Perhaps American juries, when making awards, take that into account. There is no real evidence whether or not they do. In

[5] *Reynard* v. *Carr*, (1984) 50 B.C.L.R. 166 (B.C.S.C.).

British Columbia, however, a successful litigant is usually entitled to recover his "costs" from the unsuccessful litigant. These "costs" are not the actual costs of the successful litigant as represented by the account for fees and disbursements submitted by his solicitor. Instead, they are determined by a tariff set out in the British Columbia Supreme Court Rules. The current tariff is out of date. Consequently, no matter how accurate the assessment of damages may be for pecuniary loss, the plaintiff will not be fully compensated, since he is unable to recover his full legal costs.

Frequently, the plaintiff will apply damages he receives for non-pecuniary loss to the payment of his legal fees. It is difficult to justify compelling a plaintiff to devote damages for costs of future care or lost income to paying legal costs since, presumably, that is money which he must use for future living expenses. To the extent that a plaintiff is expected to devote a portion of his award to legal costs, placing a ceiling on damages for non-pecuniary loss may seriously prejudice the plaintiff's ability to use the entire award for its intended purpose.

Similarly, a plaintiff who is contributorily negligent will have his damages reduced by the measure in which he is held to have contributed to his own loss. Damages for non-pecuniary loss, although not intended to perform that function, make additional funds available for costs of future care and other necessary expenses.

It may also be argued that modern technology is responsible for blurring the distinction between costs for solace and for future care. On the most fundamental level, whether a personal injury victim may reside at home or in an institution depends on whether his home can be adapted to his needs. These costs are characterized as pecuniary. A court, however, only makes an award for these kinds of damages based on current technology: what can be done for the plaintiff at the date of trial. And yet, significant scientific advances are almost a daily occurrence. In the past year, the news media has noted two significant technological developments which may provide, for example, quadraplegics and paraplegics with greater control over their environment.[6] The first is voice activated computer systems. These might in time permit quadraplegics to perform functions taken for granted by people who are uninjured. The second development is an external, computer linked system, that, through electrical impulses, activates leg muscles so that paraplegics may be able to walk. Damages for non-pecuniary loss may permit the injured plaintiff to build up a reserve fund to receive the benefit of breakthroughs in science. No one can guess what hope the future holds for people seriously and permanently injured. Placing a limit on non-pecuniary loss may mean that they are unable to take advantage of new technology that can provide real solace or an adequate substitute for what they have lost.

Some of our correspondents felt that there was little merit in the argument that damages for non-pecuniary loss may serve to compensate losses not specifically dealt with under other heads of damage. Evidence of loss should be led, and compensation awarded accordingly. Speculative future developments are contingencies which may equally reduce the costs of future care.

We do not mean to suggest that damages for non-pecuniary loss should be considered as compensation for other heads of loss for which inadequate or no damages are awarded. We merely doubt whether it is safe to assert that adequate compensation on other heads of loss is sufficient reason to assess non-pecuniary losses moderately.

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[6] "Power to the Disabled," *Time*, Dec. 13, 1982, at 66; *see also* "Computers and the Disabled," *Byte*, Sept. 1982, vol. 7, no. 9.

Theoretically, damages for non-pecuniary loss are designed to compensate or provide solace for pain and suffering and loss of amenities. Other heads of damage are no less specific as to what they are intended to compensate. This analytic approach to measuring damages gives the process a scientific patina which obscures a number of underlying deficiencies. As we mentioned earlier, the whole process of quantifying damages depends upon making assumptions of varying degrees of probability. Capitalizing an award of damages depends upon guessing as to future economic developments. Reducing the award for contingencies compounds the uncertainty of the process. Because of the uncertainty inherent in accurately estimating pecuniary loss, an award for non-pecuniary loss often provides a sum which safeguards the plaintiff from a financial shortfall arising because the assumptions made were wrong. Placing a ceiling on damages for non-pecuniary loss may seriously impair a function performed by those damages as an element of the whole process of adequately compensating the plaintiff.

C. Other Criticisms of the Rough Upper Limit

Various criticisms of the conclusions of the Supreme Court of Canada voiced in the trilogy have been made. These include:

(a) a policy imposed to limit social costs was a proper matter for the Legislature;
(b) the ceiling on damages leads to undercompensating victims;
(c) the ceiling on damages represents an attack on the jury system.

1. A Policy Imposed to Limit Social Costs was a Proper Matter for the Legislature

A significant reason for creating a rough upper limit on damages for non-pecuniary loss was the perceived social cost of exorbitant awards. It is questionable whether the judiciary was the appropriate body to consider this issue. It is important to keep in mind, however, that the trilogy represented a major reconsideration of the principles governing the awarding of damages generally. The questions posed by damages for non-pecuniary loss were only a part of that reconsideration. In that regard, the Supreme Court of Canada made two significant rulings. First such damages are not really compensatory. They are to provide solace. Second, they should be subject to an arbitrary limit.

On the first issue, we believe it was open to the Supreme Court of Canada to define the role to be played by damages for non-pecuniary loss. If the common law is to remain vital, the courts must continue to question whether it answers contemporary needs as well as whether it is logically correct and provides just results. The problems of quantifying the value of lost amenities had been frequently noted.[7] In our opinion, many of those problems are resolved by the functional approach.

On the second issue, we tend to agree with critics who say that the Supreme Court of Canada was not in the best position to determine whether to impose an arbitrary limit on damages for non-pecuniary loss. First, the courtroom is not well-suited to conducting thorough research into social costs and the adversarial process is not the most efficient means of resolving questions of policy divorced from a legal context. Public input would probably have been desirable. Submissions from interested parties, particularly on

[7] Ogus, "Damages for Lost Amenities: For a Foot, a Feeling or a Function," (1972) 35 M.L.R. 1

behalf of quadraplegics and paraplegics, might have illuminated the question of what constitutes "adequate compensation" for non-pecuniary loss.

It is also open to question whether any rule limiting damages for non-pecuniary loss can have Canada-wide application. If the functional approach is to work, it must be applied with respect to what the dollars awarded to a given plaintiff in given circumstances will buy. Social and economic conditions differ from region to region. A personal injury victim who lives in a small fishing village in Newfoundland may have different needs from one who lives in Vancouver. Even if their needs are the same, the costs of fulfilling them may differ. Despite the assertion of the Supreme Court of Canada that awards should be uniform nationally, these reasons strengthen the case that the question of an upper limit on non-pecuniary loss requires provincial consideration.

2. The Ceiling on Damages Leads to Under-Compensating Victims

Although the rough upper limit was justified in part on the ground that any award for non-pecuniary loss is arbitrary, we feel that the ceiling on damages is not an essential or integral part of the functional approach. If one accepts that these damages are not compensatory, it may follow that a limited award under this heading will be adequate. We are not convinced, however, that these damages are not compensatory, except in a technical sense. It is difficult to place a value on lost amenities and on pain and suffering. It would be unreal to say that an arm is worth a fixed amount, or that the diminished enjoyment of life, experienced by a quadraplegic, can be replaced by a damage award. However, the fact that money is not an adequate substitute for such losses does not change the fact that it is the only substitute. Providing a different approach to measuring these damages does not change the fact that they are still fundamentally compensatory. It must be recognized that placing an arbitrary limit on these damages may deprive individuals of something to which they are entitled.

In the Working Paper, we suggested that it did not necessarily follow that a rough upper limit as such leads to under-compensation. The question, really, is what would be a reasonable upper limit on damages for non-pecuniary loss. If that could be identified then this criticism would be adequately addressed.

Those of our correspondents who did not favour the current upper limit felt that any upper limit was undesirable. Even if a reasonable upper limit could be identified for the time being, they suggested that changes in circumstances could soon require its reconsideration.

3. The Ceiling on Damages Represents an Attack on the Jury System

Some have argued that the rough upper limit on non-pecuniary loss is a direct infringement of an individual's right to trial by jury.[8] That is a doubtful conclusion. Exorbitant awards tend to be corrected on appeal. There is not much difference between fettering a jury's discretion within reasonable limits and letting it bring in whatever award its members consider fair which is then reduced on appeal. Some may feel that appellate jurisdiction to reduce a jury award also infringes the right to trial by jury. That is another issue. We are considering in another project what jurisdiction the Court of Appeal should exercise over jury verdicts.

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[8] *See, e.g.*, G. Brudsky, "A Ceiling on Damages," (1982) 40 Adv. 235.

D. Additional Arguments in Favour of an Upper Limit

It has been six years since an upper limit on damages for non-pecuniary loss was created. Most of the litigation involving the upper limit has represented attempts to avoid its effects. Nevertheless, two aspects of the limit suggest that it is a positive factor, which aids both litigants and the courts.

1. Rehabilitation

When damages for non-pecuniary loss were at large, it is our understanding, there was an incentive for personal injury victims to dwell on their misfortunes. In order to justify maximum damages for non-pecuniary loss, the victim might, albeit unconsciously, exaggerate his injuries and minimize his prospects for adapting to them. A natural suspicion in the minds of many such victims was that a cheerful attitude, or any indication of adjusting well to the loss, minimized its severity in the eyes of the judge or jury. In general, there was a disincentive to rehabilitate.

We are advised that the upper limit appears to have a beneficial effect on the attitudes of personal injury plaintiffs. Currently, when plaintiffs are informed of the limit, the reasons for it, and the fact that damages on that head are likely to be moderate, their attention shifts to other aspects of the litigation. Income loss, costs of future care and future prospects become more important, if not crucial questions. While this argument may appear to be paternalistic, massive damages for non-pecuniary loss apparently tended to have two consequences: they reinforced the victim's negative view of his prospects and they permitted the victim to ignore his reponsibilities to himself.[9]

Whether this is true is difficult to say. It is beyond doubt, however, that the changes in personal injury damage assessment introduced in the "trilogy" have placed greater weight on determining adequate compensation for pecuniary loss. Many people believe that change in emphasis was desirable.

Some of our correspondents were incensed by the suggestion that plaintiffs might exaggerate their injuries, and felt that we were labelling them as malingerers. That was not our point. In our opinion a system, which provides certainty to measuring compensation for loss, benefits all persons involved in the dispute.

Limiting damages for non-pecuniary loss in itself does not make rehabilitiation more important to the victim. It is a result which is only incidental to limiting damages for non-pecuniary loss. That benefit arises from adopting a scheme which ensures the victim will receive adequate compensation for non-pecuniary loss based on his injuries generally, a result which flows from determining damages to provide solace on an objective basis. A seriously injured person is probably better off if aware that he will be entitled to full compensation even if he has managed to adjust well to what has happened. It encourages him to get his life back in order and to look to the future. This is, in our opinion, a desirable result.

2. Reference Point

An upper limit also eased the burden on the courts of determining the value of lost amenities. The trilogy itself indicates the problems which arose before the creation of the rough upper limit. In three different cases, plaintiffs who had suffered similarly massive and permanent injuries were awarded $150,000, (*Andrews*, reduced to $100,000 on appeal), and $200,000 (*Thorn-*

[9] *See* B.F. Fraser, "Moderation: The Reality of Non-Pecuniary Damages," (1981) 39 Adv. 315.

ton and *Teno*). There was, in these cases, no reason why Thornton and Teno should have been entitled to twice the damages for non-pecuniary loss as were awarded to Andrews. The result was injustice in that like injuries did not result in like awards. This was due largely to the lack of a reference point.

An upper limit on damages permits the courts to determine an appropriate level of damages for similar injuries on a more consistent basis. This is true of both massive and lesser injuries. The argument that lesser injuries are being inadequately compensated as a result of the upper limit, and that massive injuries as well are being inadequately compensated, is not an argument against an upper limit. Those results are attributable to three factors: the upper limit is too low; the principles to be applied are largely undefined; and the courts are unfamiliar with the new approach.

Moreover, it may be that placing an artificial limit on non-pecuniary loss significantly eases the task of quantifying damages under that head. A person seriously injured is entitled to the maximum. Someone less seriously injured is entitled to less.

Lastly, a ceiling on non-pecuniary loss may discourage litigation. Other heads of damages, while not susceptible to precise calculation, may be estimated with some accuracy. If there were no upper limit, the expectation of a high award for non-pecuniary loss might discourage settlement.[10] An approach which provides additional certainty to the process of calculating damages for lost amenities is desirable. On the other hand, some counsel maintain that the rough upper limit is an impediment to both settlement and the speedy resolution of litigation. Moderate damages for non-pecuniary loss means that the amount of damages on other heads becomes of more importance. We have been advised that trials dealing with seriously injured persons tend to be longer since the introduction of the upper limit, and there has been a noticeable increase in the number of expert witnesses called to testify by both sides to aid in the assessment of pecuniary loss.

We believe that the chief advantage of an upper limit is that it provides additional certainty and consistency to the assessment of damages for non-pecuniary loss. Nevertheless, it must be recognized that appellate review of damage awards ensures a similar certainty and consistency, and other jurisdictions, most particularly England, manage very well without a specific limit on damages for non-pecuniary loss.

E. Overall Compensation

Several of our correspondents suggested that damages for non-pecuniary loss could not be examined in isolation. The principles governing the assessment of personal injury damage awards established by the trilogy have led to increased awards on other heads such as loss of future income and costs of future care. Overall, plaintiffs receive as much or more compensation for their losses than before damages for non-pecuniary loss were subject to a rough upper limit. It was suggested that the changes wrought by the Supreme Court of Canada are desirable, since they ensure that full compensation is received for those heads of loss which are quantifiable. Removing the upper limit on non-pecuniary loss may upset the balance that has been arrived at in determining fair compensation.

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[10] A similar suggestion has been made concerning the effect of the rough upper limit and the functional approach: see Osborne, "Annotation," 1982) 19 C.C.L.T. 9; *cf.* Lewis N. Klar, "Developments in Tort Law: The 1981-82 Term," *Supreme Court Law Review*, vol. 5, 273, 285.

One correspondent made the following observations:

> In my experience, the courts are prepared to be generous to claimants by including, under future care costs, many items which might more properly be included as non-pecuniary compensation. These include vacations, entertaining expenses, magazine subscriptions, computer games, and a variety of other non-rehabilitative items.

One correspondent suggested that juries and judges often under-estimate the extent of a plaintiff's contributory negligence. In another submission, it was suggested that the burden of proof for loss of future income has been significantly eased. These correspondents differ in their conclusions as to whether the rough upper limit should be retained, but they all agree that the changes introduced by the Supreme Court of Canada in the "trilogy" are interrelated and sweeping.

We are not wholly convinced that removal of the upper limit on damages on non-pecuniary loss may upset the balance that has been arrived at in determining fair compensation. Presumably damage awards for other heads of loss are aimed at adequately compensating the victim. We suspect that current awards for pecuniary loss are higher today than before the trilogy. All that means is that personal injury victims were not receiving adequate compensation for their pecuniary loss before the trilogy. Higher awards on other heads of damage do not present compelling reason to retain a system which may under-compensate a plaintiff for non-pecuniary loss. Moreover, damages are not assessed in isolation. Each head of damages may be determined separately, but the jury or judge assessing damages is under a duty to consider whether the entire award is reasonable. Any overlap between heads of damage should be corrected at that time. Removing the upper limit would not alter the fact that compensation for loss consists of interrelated considerations.

CHAPTER IV IS THERE A NEED FOR AN UPPER LIMIT?

A. General

The three cases before the Supreme Court of Canada which prompted the creation of an upper limit, represented a wide range of awards for massive injuries. The awards varied between $100,000 and $200,000. The Supreme Court of Canada chose the lowest of those awards as the limit. That approach, as we have seen, has caused problems with respect to measuring damages for non-pecuniary loss flowing from lesser injuries. It has also probably led to undercompensating personal injury victims generally.

The only conclusion that can be reached with absolute certainty is that the current "limit" is far too low. A survey of awards made in pre-trilogy cases suggests that the courts had already identified an "upper limit" for damages for non-pecuniary loss. It also indicates that escalating awards were not the result of sympathies run wild, but of signficant changes in the methods used to determine damage awards.

B. Pre-Trilogy Cases

Our survey of pre-trilogy awards was anything but conclusive. First, in many cases, the courts made a global award, so that it was impossible to determine what value they placed on damages for non-pecuniary loss. Second, it is only in recent years that medical science has been able to save the lives of victims of massive injuries, so that these questions of compensation arose rarely before 1970. Third, even where awards are broken down to indicate the portion representing damages for non-pecuniary loss, comparison is not profitable. The measure of damages turns upon the personal characteristics of the plaintiff, and there are not enough cases to form a representative sample. Injuries similar in kind suffered by a three month old baby, an 18 year old boy and an octogenarian will justify radically different damages for non-pecuniary loss.

It was our suspicion that this survey would show that awards over the last several decades had not risen dramatically. A comparison of awards, adjusted to reflect present value, we suspected, would reveal a consistency otherwise masked by inflation. We were wrong.

Something did happen in the late '60's and early '70's. Personal injury awards increased dramatically, beyond any amount represented by inflation (although inflation was a significant factor). In the '50's, global damage awards for massive injuries rarely exceeded $40,000. By the early '70's, global damage awards were approaching $1 million dollars, almost ten times what was being awarded in the '50's, adjusting that amount for inflation. What happened?

First, it is important to have some understanding of the former judicial practice in personal injury cases, and of the history of damages for non-pecuniary loss. We have used the term "non-pecuniary loss" in a general sense, but it embraces three general heads of non-pecuniary loss: pain and suffering, loss of expectation of life and loss of amenities. These general heads represent imprecise classifications of comparatively recent origin:[1]

> As with the head of non-pecuniary loss itself, the evolution of the subheads has been gradual. For one thing they began to emerge at different times: pain and suffering in the last century, loss of expectation of life in 1909, and loss of amenities around 1938. More significantly, for many years the elements of

[1] Cooper-Stephenson & Saunders, *Personal Injury Damages in Canada*, (1981), 350.

intangible loss were itemized by Canadian courts in light of the extremely imprecise classification of heads of damage contained in *Phillips* v. *London South Western Ry.* For example, as late as 1959 the elements to be submitted to the jury were categorized *inter alia* as:

1. The bodily injury sustained.
2. The strain undergone; the pain undergone.
3. The effect on the health of the sufferer according to its degree, and its probable duration as likely to be temorary or permanent. . .

. . . .

6. The inability for a temporary or longer period to enjoy the normal social routine of life.

Notwithstanding the formulation in *Andrews*, it is possible that the subheads will continue to evolve; that, strictly speaking, they are merely illustrative rather than definitive of the scope of intangible loss. Thus prior to *Andrews*, in *Jackson* v. *Millar*, the Ontario Court of Appeal mentioned "pain, suffering, loss of amenities of life, disfigurement, loss of expectation of life *and other intangible, but compensable losses* . . . ". Furthermore, even in *Andrews* itself Dickson J. alluded to "non-pecuniary loss, including *such factors as* pain and suffering, loss of amenities and loss of expectation of life". But perhaps the evolution of the subheads will lead to their disappearance rather than their elaboration, for it is quite arguable that they serve no necessary purpose. [original emphasis]

It is not surprising to find the courts revising and developing the principles to be applied when determining compensation for non-pecuniary loss, given that the sub-heads of damage are of such recent origin. Those principles did not undergo radical revision until recently because of several factors.

First, the former practice of the courts was to make a global award of general damages.[2] In determining a global award, courts were not required to assess separate heads of general damage and, in fact, resisted breaking down the global award of general damages. A natural result of that approach, since the global award seemed large, was that inadequate attention was paid to its components, which, it appears, were often underestimated.[3]

The second factor relates to personal injury advocacy. Before, say, 20 years ago, although in some cases actuarial evidence was led, it was not a common practice. Without that information, any estimate of costs of future care and loss of future income depended upon guesswork. Moreover, without some indication of the plaintiff's life expectancy, damages for non-pecuniary loss were often underestimated. Lawyers specializing in personal injury litigation became more adept and sophisticated in their presentation. Counsel on *Andrews* and *Thornton*, for example, have been considered as Canadian pioneers of techniques in personal injury litigation.

Gradually, with the improvement of skills of advocacy in this area and with the increasing availability of expert evidence from actuaries, industrial psychologists, vocational counsellors, health care economists, rehabilitation consultants, and the like, the courts were compelled to consider costs of future care and loss of future income in detail. Awards on these heads became arithmetic exercises rather than matters of guesswork and led to larger awards. As a result, although the courts continued to make global awards, they often indicated amounts which were attributable to separate heads of general damages. We suspect that that exercise led to a realization that damages had previously been awarded on a miserly scale.

The last factor which contributed to the dramatic increase in the size of personal injury awards was the introduction of the *Prejudgment Interest Act*[4]

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[2] "General damages" refers to losses flowing naturally from the wrong and consist of future pecuniary loss and all non-pecuniary loss. They are to be contrasted with "special damages" which consist of all pre-trial pecuniary loss.

[3] *See, e.g., Fletcher* v. *Autocar and Transporters Ltd.*, [1968] 2 Q.B. 322 (C.A.).

[4] S.B.C. 1974, c. 65.

in 1974. Under that Act, the courts were obliged to award interest on damage awards. Interest, however, was not payable on future pecuniary losses so that damages on those heads had to be separated out in the judgment. It was now impossible to make a global award without giving close attention to its components.

These factors were not considered by the Supreme Court of Canada when they revised the principles for determining damages for non-pecuniary loss. They pointed instead to the American experience, concluding that it was improperly influencing damage assessments in Canada. Although that may have been a factor, we do not think that it was the most significant cause of the general increase in awards for personal injuries.

If the cause of these increases had merely been sympathetic reaction to the personal tragedies of gravely injured people, it is possible that, as the Supreme Court of Canada suspected, damage awards would continue to increase dramatically. Our conclusion, however, is that in the late '60's and early '70's, there was a change in attitudes toward the question of what constituted adequate compensation. The reasons for that revision do not suggest that damage awards would have continued to rise dramatically. It was likely that further increases in quantum would have been due only to inflation. Consequently, we have concluded, the awards made in the early '70's as compensation for non-pecuniary loss represent a fair assessment of damages. Further growth in damage awards, apart from inflation, would have been unlikely.

C. The English Experience

Problems of compensating for non-pecuniary loss have long concerned English courts, which have dealt with them in a slightly different manner than the Supreme Court of Canada. The need for a conventional award which could be determined with some consistency first led to the curtailment of the right to trial by jury. Rarely are personal injury actions in England heard by a jury. Second, the English Court of Appeal announced a greater willingness to review awards in order to maintain consistency.[5] Whether that has in fact happened is difficult to determine from the reported cases.

As in British Columbia, English courts began to break down and itemize awards.[6] That led to increases in the size of damage awards for personal injuries, just as in British Columbia.[7] The reaction was to exercise a discretion to reduce an itemized award which, in total, was "daunting."[8] The increase in the size of damage awards was attributed initially to overlap between the various heads of damage.[9]

It appears that itemization of awards occurred in England earlier than in British Columbia. In part, that was the result of the earlier enactment in England of legislation providing for interest on personal injury awards.[10] It is difficult to say whether this aspect of English jurisprudence influenced British Columbia law, although it is likely that it had some effect.[11]

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[5] *Ward* v. *James*, [1966] 1 Q.B. 273 (C.A.).

[6] *Jefford* v. *Gee*, [1970] 2 Q.B. 130.

[7] *Ibid.*

[8] *Ibid.* An approach disapproved of in *Lim Poh Choo* v. *Camden and Islington Area Health Authority*, [1980] A.C.174, [1979] 2 All E.R. 910 (H.L.)

[9] *Supra*, n. 3.

[10] *Law Reform (Miscellaneous Provisions) Act, 1934*, 24 & 25 Geo. V, c. 31; *Administration of Justice Act, 1969*, c. 58 (U.K.), s. 22. Awards of prejudgment interest in England were rarely made until the introduction of the 1969 Act.

[11] *See, e.g.*, *Cooper-Stephenson*, *supra*, n. 1 at 47-8; *see also* Alta. T.D. decision in *Andrews*, (1974) 54 D.L.R. (3d) 85, 92-4, *per* Kirby, J.

In order to award damages for non-pecuniary loss on a consistent basis, the English courts adopted a practical rationale, which parallels the "functional approach" adopted by the Supreme Court of Canada. Briefly, the impossibility of fully compensating a plaintiff for his injuries led the courts to adopt a conventional, objective approach to the assessment of damages for non-pecuniary loss.[12] Although no upper limit has been adopted, the English approach appears to have achieved an internal consistency so that similar awards are made for similar injuries. That result is the product of limited jury use and rigorous appellate review together with the application of an objective standard to measuring these damages. The relative size and concentration of the English bar undoubtedly played some part in this process.

The English experience suggests that there is no need for an upper limit in order to suppress damages for non-pecuniary loss to a reasonable level. The chief utility of an upper limit in England, it has been suggested, would be to ensure greater consistency and certainty in the measure of damages. The adoption of an upper limit in England has, for that reason, been urged in several cases.[13] The House of Lords has concluded,[14] however, that this is a matter which must be addressed through legislation. The position adopted by the House of Lords is in marked contrast with that of the Supreme Court of Canada.

D. Summary

The factors which led to increases in damages for non-pecuniary loss are identifiable. Larger awards were the result of innovations in practice. The force of those factors would appear to have been spent, and would no longer contribute to still greater awards on the head of non-pecuniary loss. Other jurisdictions, most notably England, have experienced similar increases in damages for personal injuries. After a period of readjustment, awards for personal injuries generally, and for non-pecuniary loss, have settled into predictable patterns, without the benefit of a rough upper limit.

There would appear to be no need for a rough upper limit on compensation for non-pecuniary loss.

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[12] *See Lim, supra*, n. 8; *see also Croke* v. *Wiseman*, (1982) 1 W.L.R. 71 (C.A.).

[13] *Croke, ibid.*

[14] *Lim, supra*, n. 8.

A. Conclusions

1. The Functional Approach

It is our opinion that, in application, the functional approach to measuring damages for non-pecuniary loss has not proved to be very different from the former method of assessing those damages. It recognizes that the loss represented by injury cannot be quantified, and that if compensation for non-pecuniary loss is to be adequate, it must be seen as a means of providing the plaintiff with substitutes and comfort for what he has lost. Its chief value lies in directing the courts' attention to the realities of compensating for pain, suffering and lost amenities.

It is possible, however, that the Supreme Court of Canada intended the consequences of adopting the functional approach to be more far-reaching. If something more than identifying a different philosophical basis for calculating compensation for non-pecuniary loss was intended, it is not clear what the significance of that change is. Many of our correspondents felt that the functional approach has led to unwarranted confusion.

They were concerned that the functional approach might develop into a subjective test that would lead to inconsistent awards. The Commission shares these concerns. If judicial development of the law takes that course, the desirability of retaining the functional approach should probably be reconsidered.

There are sound reasons for the current position adopted with respect to persons insensible of their injuries because they are permanently unconscious or by reason of brain damage. Whether the approach endorsed by the British Columbia Court of Appeal will survive remains to be seen. That issue can be safely left with the courts to resolve. Legislative intervention should await consideration of this issue by the Supreme Court of Canada.

Apart from those exceptional cases, it is our opinion that damages for non-pecuniary loss should be determined objectively in order to arrive at an award that would be reasonable compensation (in the sense that it would provide solace) for most people similarly injured. We think, however, that after determining a reasonable award that will provide the injured person with solace, based upon the injuries suffered and comparison with previous awards, the courts should have discretion to vary it upwards or downwards to take into account special factors which may arise in the case. For example, a 60 year old woman and an 18 year old boy may suffer similar injuries, but the solace required by each will differ, if only due to their differing ages.

In our opinion, this approach is being adopted by the courts currently, and need not be embodied in legislation.[1]

2. The Rough Upper Limit

A rough upper limit can produce three significant results. First, it can ensure that damages do not continue to increase in an uncontrolled fashion beyond those attributable to inflation. Second, depending on the level where it is set it can have the effect of "rolling back" damages. Third, it can serve as a reference point, to assist in assessing damages at all levels. When the Supreme Court of Canada chose an upper limit on damages for non-pecuniary loss, it was prompted primarily by an upper limit's potential to achieve the first two results.

[1] *See, e.g., Demchuk* v. *Dean*, [1983] B.C.D. Civ. 208-04 (B.C.C.A.).

It is our conclusion that it is unnecessary to limit damages for non-pecuniary loss. They are unlikely to continue to increase except to account for inflation. The forces that led to the rapid increase in damages for non-pecuniary loss prior to the trilogy were discussed in the last chapter. In our view, the momentum of those forces is now spent. It is also our conclusion that it is undesirable to roll back damages for non-pecuniary loss to what the Supreme Court of Canada perceived to be moderate levels. The level set by the Supreme Court of Canada has proved not to be moderate but in many cases wholly inadequate. The current upper limit has created a situation where victims of massive injuries are receiving only marginally more than victims of less severe injuries. A paraplegic is entitled to almost as much as a quadraplegic, and yet their needs will differ significantly, as will the kinds of substitutes for their losses that will provide them with some solace. That is the strongest evidence that the current upper limit is set at too low a level. An upper limit, designed to suppress damages for non-pecuniary loss to a moderate level, has affected the measurement of these damages at every level.[2]

The current upper limit on damages for non-pecuniary loss also appears to have raised a number of theoretical and practical problems which, even if resolved, will not ensure that plaintiffs receive adequate damages for their injuries. In addition, it is difficult to say exactly what purposes are served by these damages and viewing them as serving either compensatory or consolatory functions only is probably simplistic. Lastly, in our view regional differences have greater significance than the Supreme Court of Canada contemplated. While uniformity of awards is desirable for many reasons, nationwide uniformity in this respect in a country as diverse as Canada is a goal of dubious value.

It is our conclusion that reform of the current upper limit on compensation for non-pecuniary loss is called for.

3. The Working Paper

In the Working Paper, we tentatively concluded that there was no need to arbitrarily suppress awards for non-pecuniary loss. That feature of the current rough upper limit was undesirable. We were concerned, however, with the consequences of abolishing the rough upper limit on non-pecuniary loss:[3]

> First, the Supreme Court of Canada imposed the upper limit, in part, to restore certainty to a system of measuring damages which, because it was going through revision, led to inconsistent awards. Removing the upper limit may only have the effect of restoring that uncertainty. Second, the functional approach is imperfectly understood, and its principles are still being developed and tested. In these circumstances, removing the upper limit is even more likely to result in inconsistent awards.

There are two methods of achieving certainty and consistency in the assessment of damages for non-pecuniary loss. One is through appellate review. The other is through the adoption of a reference point for damages for most serious kinds of non-pecuniary loss. The difficulty presented by the second method is to determine an amount which would not arbitrarily suppress awards for non-pecuniary loss.

In the Working Paper, we suggested that the trial award in *Thornton* provided some guidance for determining a fair upper reference point. There

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[2] *See, e.g.*, *Duncan* v. *Braaten*, (1980) 21 B.C.L.R. 369 (B.C.S.C.); *Letourneau* v. *McCoy*, (1980) 21 B.C.L.R. 21 (B.C.C.A.); *Robson* v. *Official Administrator*, (1979) 12 B.C.L.R. 208 (B.C.C.A.).

[3] At p. 39.

the plaintiff was awarded $200,000 for non-pecuniary loss. The trial date was January 23, 1975. The trial award made in that case represented an amount which was designed to be fair compensation for non-pecuniary loss for the most massive kind of personal injury. Moreover, it was one of the last of such determinations before an artificial limit was imposed, and appeared to be consistent with previous authority. Andrews J., the trial judge who heard the *Thornton* case, made the following statement concerning the size of the award in Thornton:[4]

> I have both outlined and followed [the authorities on damage assessment] and express no concern that at first blush this award is much higher than any other personal injury award given in British Columbia, or possibly Canada. As I view the matter, the underlying principle is, and has been, that the plaintiff should be put back into the position both in terms of finances and health that he would have been had he not been injured, in accordance with the principles which I have stated above. He should not, and indeed cannot, be awarded perfect compensation. One should be fair to each side. I have been careful on the one side, as Mr. Merritt, Q.C., so aptly put it in argument not to "soak the wrongdoer"; but on the other side, I have endeavoured to use the wrongdoer's money to provide Gary with the dignity, comfort and length of life to which we all in this society feel so rightly entitled. The principles have not changed, and that is fortunate for they make good sense. It is the medical evidence that has changed and warrants the large award assessed in this case . . .

On appeal to the British Columbia Court of Appeal, it was held that this amount, while generous, was not inordinately high. Consequently, in 1975, the judicially determined upper reference point in this province for damages for non-pecuniary loss arising from massive injuries was approximately $200,000. Adjusted for inflation, the value of the limit at the time the Working Paper was published would have been approximately $400,000.[5] We tentatively proposed that legislation should confirm that the rough upper limit for damages for non-pecuniary loss be set at $400,000 as of April, 1983. The rough upper limit would be adjusted to take into account inflation from April 1983 to the date of judgment.

A criticism made by several of our correspondents was that there was no justification for selecting $400,000 over any other level for an upper limit on non-pecuniary loss. We do not dispute that. It was our conclusion that the Supreme Court of Canada had rolled back damages for non-pecuniary loss by selecting an upper limit which was significantly less than awards that had been made for the most serious kinds of injuries. In our opinion, the reasons given by the Supreme Court of Canada for rolling back damages for non-pecuniary loss were not convincing. It was our conclusion that larger awards for non-pecuniary loss were the result of significant changes in the methods used to assess damages generally, and that those changes in the assessment of damages were unlikely to result in further escalation of damage awards for non-pecuniary loss other than by reason of inflation. Consequently, we chose the highest awards for non-pecuniary loss made before the trilogy as guides for determining an upper limit that would not impact on the level of damages awarded in the future, other than as a tool for measuring those damages with greater consistency and certainty. We were attempting to undo what the Supreme Court of Canada had done.

The Commission's proposal rested on three conclusions. First, there was no need for a rough upper limit on damages for non-pecuniary loss to keep them within reasonable levels. Second, pre-trilogy damage awards were such

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[4] *Thornton* v. *Board of School Trustees of School District No. 57*, (1975) 57 D.L.R. (3d) 438, 463-4 (B.C.S.C.).

[5] Using the consumer price index (see Appendix to this Report), $200,000 in January 1975 was equal to $414,311.27 in April 1983: $\frac{\$200,000}{55.9} \times 115.8 = \$414,311.27$. We rounded this figure off to $400,000.

that they could not be called immoderate. There was no need to roll back awards for non-pecuniary loss. Third, a reference point would be useful to assist in measuring damages with greater certainty and consistency.

The distinction between an upper limit and a reference point is one that we drew to assist in the analysis of problems arising in compensation for non-pecuniary loss. The difference between the two rests in their intended purposes. An upper limit is designed to suppress awards. A reference point is designed to aid in the assessment of damages. If awards for non-pecuniary loss were likely to rise for non-inflationary reasons, it would follow that any reference point, however fairly determined, would eventually operate as an upper limit. Our research, discussed in the previous chapter, suggested that awards for non-pecuniary loss were unlikely to increase, except by reason of inflation.

B. Responses to the Working Paper

The Commission's proposal failed to attract any support. Our correspondents divided into two camps: those who favoured retention of the current limit and those who urged its abolition.

While we expected division of opinion, we were surprised that response was confined to the single issue of whether there was a need for a rough upper limit on damages for non-pecuniary loss to keep them within moderate levels. No one addressed the issue of whether there was a need for a reference point to assist in measuring damages with greater certainty and consistency.

In part, the lack of comment on that issue might have been due to a perception that an upper reference point was synonomous with an upper limit. Someone who thought that damages for non-pecuniary loss were likely to increase for non-inflationary reasons in the absence of an upper limit would see no difference between an upper limit and a reference point. For reasons we discussed in the last chapter, we do not think that removal of the upper limit will result in higher awards for non-pecuniary loss, after an initial period of adjustment.

Upon reconsideration, we continue to believe that a reference point for assessing damages for non-pecuniary loss would be useful. An increased upper limit would ease the pressure on damages for less severe injuries. It would provide a reference point for calculating damages for non-pecuniary loss at all levels. It would ensure that awards were made with some degree of certainty and consistency. Insurers could predict the cost of future claims with some confidence. It is an approach which should have met everyone's concerns.

For those who favour the current upper limit, an increased upper limit would provide all of the safety of the present law. In their eyes, however, it had several defects.

First, it was argued, plaintiffs are adequately compensated currently. There is no need for reform. We disagree, for reasons thoroughly canvassed earlier.

Second, there is no justification for choosing any other amount than the current upper limit. We agree that there is no objective criteria by which an upper limit can be determined the fairness of which is beyond dispute. Nevertheless, our research confirms that the current upper limit is too low. Pre-trilogy awards provide some guidance for establishing a fair upper limit.

Third, it was maintained that higher awards for non-pecuniary loss will lead to prohibitive expense in the form of higher insurance premiums. The

evidence is against that position, and is discussed in greater detail later in this chapter.

For those who favoured abolition of the current upper limit, the proposal provided an increased range for awards for non-pecuniary loss, which would remove the pressure on awards for less serious injuries and more than double compensation for non-pecuniary loss for those suffering most serious injuries. These correspondents found two defects in the proposal.

First, it was submitted to us, there was no need for an upper limit. We agree that an upper limit is not a necessity. If an upper limit is set high enough, the results achieved under it should not differ from those which would ensue without an upper limit. The utility of an increased uppper limit lies mainly as a safeguard against inordinately large awards. It also provides guidance to the courts on assessing damages which are unquantifiable by objective means.

Second, it was argued, the increased upper limit was too low and any upper limit, eventually, would be too low. We disagree. Whether left to the courts or the legislature, damages for non-pecuniary loss will be subject to regulation. It is unlikely that, if the upper limit is abolished, awards for non-pecuniary loss will rise beyond the amount we identified as the level for a legislated upper limit.

Consequently, we still favour the proposal we made in the Working Paper. Nevertheless, response to the Working Paper has convinced us to reconsider our position.

C. Impact on Insurance

British Columbia has a motor vehicle insurance system which compares favourably with that of any other jurisdiction. Criticism has been levelled at specific aspects of that system, and there is some controversy over whether an alternative scheme might be adopted. Nevertheless, the cost of insurance is affordable, and the majority of motorists have third party coverage of $500,000 or more. As a result, there are usually funds available to satisfy judgments in favour of persons injured in motor vehicle accidents.

Of concern in considering any change that affects insurance coverage is whether its costs would increase so markedly that motorists, for reasons of economy, would fail to obtain adequate coverage. Some of our correspondents feared that that might be the consequence of increased awards for non-pecuniary loss.

One correspondent advised that:

> In California, for example, the minimum limits are about $30,000.00 and something like 75% of those drivers with insurance carry the minimum limits. Something like 30% of the drivers in California do not have any insurance. So it is fine to talk of high awards. It is another thing for the victims to collect them.

Another correspondent voiced similar concerns:

> The upper limit is continually adjusted to offset the effects of inflation and to modify this would be to create an unnecessary extension of awards of damages under one particular head when all other heads of damages are ostensibly designed to fully compensate the victim. The effect would be a significant financial impact upon each and every motorist irrespective of whether a Provincial plan or an independent insurer is involved.
>
> Drivers will likely purchase the coverage, if it is available, but may ultimately conclude that the costs of the entire insurance scheme are so substantial that the scheme itself becomes unacceptable. They will then seek an alternative. If, on the other hand, the public decides not to purchase the coverage because it is too costly, more underinsured people will become involved in litigation, with the result that more damage awards will never be collected. In either event, without control on the cost of the system to the public, pressure will build for an alternate compensation scheme.

While we recognize there is some force to these concerns, and any prediction as to the financial consequences of change in the calculation of damage awards contains an element of uncertainty, it should be recognized that even without the rough upper limit on damages for non-pecuniary loss, "control on the cost of the system to the public" was achieved through appellate review of excessive awards.

With the assistance of an actuary and with certain statistical information provided by the Insurance Corporation of British Columbia (I.C.B.C.) we attempted to predict the impact on motor vehicle insurance premiums of higher awards for non-pecuniary loss. A discussion of the methodology of that study is to be found in Appendix B to this Report.

While our study was confined to only one area of insurance (motor vehicle accidents), that represents probably the most signficant collection of claims for non-pecuniary loss, in terms of both number and size of claims. We, therefore, thought it appropriate to single out automobile insurance for special attention.

There were two areas where it was necessary to proceed on the basis of assumptions rather than statistics:

(a) the proportional distribution, as between pecuniary and non-pecuniary loss, of personal injury recoveries for various sizes of claim. At the time of our study, statistical information on this distribution was not available;

(b) the impact that the alteration or elimination of the upper limit would have on recoveries for non-pecuniary loss for claims at various levels. This is purely an exercise in prophecy.

The assumptions, or ranges of assumptions, used with respect to these two parameters were devised solely by Commission staff.

If one assumes that lower awards will increase moderately, highest awards will double, and awards in between will increase according to a graduated scale, the increase in premiums to provide a sufficient reserve for future claims would be between approximately $16.00 and $21.00.[6] For the full range of assumptions tested, please refer to Appendix C.

The study does not indicate the basis upon which increases in premiums should be calculated, nor what those increases should be. It indicates only the order of magnitude of such increases necessarily following removal of the upper limit. The study indicates that concerns over the costs of insurance with respect to compensating for non-pecuniary loss were overstated by the Supreme Court of Canada. While we concede that the results indicate that increases in insurance premiums would not be nominal, neither would they be prohibitive in the sense that automobile insurance would be priced beyond the reach of the average citizen. Moreover, our assumptions were based on significant changes in the amount of damages that might be awarded for non-pecuniary loss. In our opinion, removing or increasing the rough upper limit is unlikely to result in any changes in awards for less serious injuries. Since the upper limit may not be considered, or disclosed to a jury, when assessing damages for less serious injuries it can have little or no impact on them. For more serious injuries, we would expect awards for non-pecuniary loss to increase, but it is unlikely that awards would, for example, double overnight. Any increases should be more gradual than that.

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[6] The study included assumptions varying between very moderate to substantial increases for non-pecuniary loss. For a description of the methodology of the study, please refer to Appendix B. For a list of assumptions tested and the full range of results from the study, see Appendix C.

It should be recognized that the issue is really not what is an acceptable cost for compensating for non-pecuniary loss, but who should bear that cost. At first glance it may appear to be a choice between the victim and people who pay insurance premiums. But that is probably a narrow view of the problem. If the loss falls on the victim, then he will probably rely on publicly funded programs to offset that loss, so that the cost is born by the public generally or by private philanthropy. One need only consider the number of programs funded by the government and by charities that provide handicapped people with entertainment, recreation and counselling to see that that is true. One submission we received made the following observations:

> It seems to me that these arguments all avoid the main point. The argument for undercompensation of victims to keep insurance premiums down simply means that victims should absorb part of their loss to subsidize the premium paying public. Apart from the resulting unfairness to victims, it understates the cost of personal injuries and thereby precludes the economy from receiving the real cost signal through insurance premiums.

D. Recommendation

A majority of the Commission finds no merit in retaining the current upper limit. The choice is between the outright abolition of the upper limit, or an increase in it. While there is much to be said in favour of increasing the upper limit, the hostility against that course is a reflection of the current practical and theoretical problems engendered by the current upper limit. Our correspondents' concern that any upper limit will permit those problems to persist must be given weight.

A majority of the Commission has concluded that the rough upper limit on damages for non-pecuniary loss should be abolished. One member of the Commission dissents from this conclusion. His dissent is to be found at the end of this chapter.

Abolishing the upper limit will probably result in temporary uncertainty until the courts have time to determine adequate levels of compensation for non-pecuniary loss.Nevertheless, the former test of reasonableness achieved awards within recognizable ranges. Appellate review will quickly restore certainty to assessing damages for non-pecuniary loss and we expect that, in short order, general ranges of compensation for particular kinds of injuries will be established. Those general ranges of damage awards, however, will be more flexible than an arbitrary upper limit. Moreover, damages for non-pecuniary loss arising from the most serious kinds of injuries would not be subject to an arbitrary and fixed amount.

Since the means are available to ensure that reasonable awards are made for non-pecuniary loss, it is not necessary to adopt an increased upper limit for damages for non-pecuniary loss which, its critics fear, might eventually have the same impact as the current upper limit, distorting the assessment of those damages.

While removing the rough upper limit may increase the importance attached to assessing damages for non-pecuniary loss, the majority of the Commission believes that that is unlikely to result in a deemphasis in the concern to provide full compensation for pecuniary loss.

The Commission recommends that:

The rough upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada in the "trilogy" be abolished.

E. Transition

We have considered problems of transition that may arise in legislation implementing the recommendation. Such legislation should probably only apply to causes of action arising after its enactment, but there are arguments in favour of giving it limited retrospective effect. After all, when first introduced by the Supreme Court of Canada the upper limit was applied retrospectively.

Transition in this case, however, is complicated by the interests of insurers as well as by the cost of insurance. Insurers may need time to adjust premiums in accord with higher claims that will probably follow the removal of the upper limit on compensation for non-pecuniary loss. If abolition of the upper limit is retrospective, a significant short term increase in premiums would be required to cover the costs of pending claims as well as prospective claims under existing policies.

If one assumes that lower awards will increase moderately, highest awards will double, and awards in between will increase according to a graduated scale, the increase in premiums needed to cover all pending and prospective claims would be approximately $60.00 to $70.00.[7] Any increase in awards for non-pecuniary loss is likely to be more modest than the assumptions used to derive this figure. It should be regarded as indicative of the maximum premium increase likely to result. This increase would be on a short-term basis, and its effect would depend upon the number of years over which the cost will be spread.

Problems of transition should be addressed at the time the recommendation is implemented, after consultation with the insurance industry. The cost considerations are clearly of significance in determining whether abolition of the upper limit should have retrospective effect or should only apply prospectively.

F. Acknowledgments

We wish to express our appreciation to all who took the time to consider the Working Paper and offered us their comments and suggestions. The submissions we received were thorough, thoughtful and of great assistance.

We also wish to acknowledge the contribution of two people who played an important role in this project: Kenneth C. Mackenzie, Esq., former member of the Commission, and the Honourable Mr. Justice J.S. Aikins, former Chairman of the Commission. Both participated in the development of the Working Paper.

Finally, we wish to express our gratitude to Thomas G. Anderson, Counsel to the Commission. Mr. Anderson, subject to direction from the Commission, drafted both the Working Paper and this Report.

ARTHUR L. CLOSE
BRYAN WILLIAMS
ANTHONY F. SHEPPARD
RONALD I. CHEFFINS

September 7, 1984

[7] If pending claims and prospective claims under existing policies are included, the increase per premium varies substantially depending on the assumptions tested. For the range of assumptions tested, and the results from the study, please refer to Appendix C. Table 3 (B) in that Appendix lists the results from the study with respect to the total cost of retroactive and prospective application. These figures were derived assuming the total cost for retroactive claims is spread over three years.

MEMORANDUM OF DISSENT BY ANTHONY F. SHEPPARD

As the Report demonstrates, much can be said for and against the $100,000 rule. I disagree with the majority of the Commissioners, however, and have concluded that the rule has withstood scrutiny and should be retained. In reaching that conclusion, I have asked myself the following three short questions:

1. Is the $100,000 rule unfair to tort victims?
2. Is the majority's recommendation consistent with other Commission Reports?
3. Is the $100,000 rule in the public interest?

* * * * * * *

1. *Is the $100,000 rule unfair to tort victims?* In my opinion, the $100,000 ceiling is fair. In a personal injuries action, a plaintiff may claim compensation for three types of losses: (i) loss of pre-trial earnings and loss of earning capacity; (ii) pre-trial expenses and costs of future care; and (iii) non-pecuniary loss, including pain and suffering, loss of amenities, mental or physical disability and shortened life expectancy. The $100,000 limit applies only to the amount recoverable for non-pecuniary loss.

A tort victim is entitled to full compensation for the first two heads of loss, and they can be specifically quantified. Damages for non-pecuniary loss are compensatory only in a limited sense because money damages cannot remove the victim's pain and suffering, take away the disability or give back the lost years. Since money damages are simply inadequate to compensate for non-pecuniary loss, judges have frequently said that such awards should be reasonable but moderate. The judge or jury is supposed to avoid excessive or over-compensatory awards. As I see it, the $100,000 rule simply puts a specific dollar limit to such awards, adding certainty to an an established principle. Critics of the rule have not shown and indeed cannot show convincingly that the limit is unfair because non-pecuniary losses cannot be objectively quantified and because $100,000 adjusted for inflation and with court order interest is a substantial sum of money.

While critics have contended that the limit is unfair to the victims of catastrophic injuries, I doubt the validity of this point. Such victims usually have claims for lost earning capacity and costs of future care. In Canada, lost earning capacity is measured by the victim's prospective future gross earnings, without the deduction of income tax. This measure is more generous to the victim than after-tax earnings, which is the measure in England, Australia and parts of the United States. One of the purposes of the award of damages for lost earning capacity is to enable the victim to purchase recreational consumer goods and other distractions. Similarly, as several proponents of the limit have pointed out to the Commission, under the heading of costs of future care, the victim of catastrophic injuries can claim much more than the medical and personal expenses essential to survival. In this sense the amounts awarded for loss of earning capacity and costs of future care cover some of the same ground as non-pecuniary loss.

Then, critics say the $100,000 rule is unfair to tort victims such as children, housewives and retired people who have suffered catastrophic injuries but cannot claim loss of earning capacity because they are not earners. These critics seem to feel that a judge or jury should be entitled to increase a

non-earner's award for non-pecuniary loss to fill the absence of pecuniary loss, and equalize the total amounts awarded to earners and non-earners for comparable injuries. Such an approach is unfair to the defendant because it amounts to awarding exemplary or punitive damages, meaning that the amount awarded exceeds the plaintiff's actual loss. Using damages for non-pecuniary loss in this way violates the compensation principle applicable in cases of simple negligence.

2. *Is the majority's recommendation consistent with other Commission Reports?* In my respectful opinion, the majority has departed from policies that it has previously espoused in two other Reports, the first inconsistency being less serious than the second. First, in the *Report on Breach of Promise of Marriage*, the Commission recommended that the action be abolished, to recognize changing social values and to eliminate a potential source of fortune hunting and blackmail. The action for breach of promise of marriage is historically one of the few breach of contract actions in which the plaintiff can claim damages for non-pecuniary loss, and the Report criticized it on that ground. Yet in the *Report on Compensation for Non-pecuniary Loss*, the majority's recommendation would tend to achieve the opposite effect of encouraging non-pecuniary claims in tort.

Second, in the *Report on Review of Civil Jury Awards*, the Commission recommended that legislation be enacted permitting a judge, if it would be helpful to the jury in a personal injuries case, to suggest a range of amounts that the jury might award for non-pecuniary loss. Underlying this recommendation was the Commission's desire to provide guidance for the jury in performing its inherently difficult task of quantifying a claim for non-pecuniary loss. This recommendation could also prevent excessive jury awards and dispel any erroneous ideas that the jurors might have picked up from the American media about the huge amounts claimed and sometimes awarded for non-pecuniary loss in the United States. Since the $100,000 rule also furthers those objectives, the majority's recommendation to abolish it seems inconsistent.

3. *Is the $100,000 rule in the public interest?* While compensation for non-pecuniary loss may be a part of common law tort damages, it is often eliminated or subject to limits in statutory compensation systems such as workers' compensation, criminal injuries compensation, no-fault liability and product liability because of the primacy of compensation for pecuniary over non-pecuniary losses. Royal Commissions and other authorities have recommended that upper or lower (or both) limits be legislated on tort damages for non-pecuniary loss, showing that there is considerable impartial and informed support for the approach adopted by the Supreme Court of Canada.

I am also opposed to the abolition of the $100,000 rule because it will probably increase the cost of automobile insurance in the Province, as the Report fairly points out. The Report also adverts to the high cost of medical care in the United States but does not point out the probable connection between that cost and non-pecuniary loss claims. I believe that some of the cost may be attributed to the high premiums for medical malpractice insurance which American physicians and hospitals pass on to their patients through professional fees and user charges respectively. The abolition of the $100,000 rule might similarly increase the costs of health care in British Columbia. I disagree with the majority's view that such developments will send the public a signal of the true social cost of personal injuries. The public reaction would most likely be negative, and the Legislature might respond by enacting a limit

lower than the $100,000 rule to non-pecuniary loss claims and perhaps extend limits to pecuniary claims. Some American jurisdictions reacted thus to the malpractice insurance crisis in the 1960's-70's.

Finally, I feel that the abolition of the $100,000 rule will cause uncertainty in the law, and a dramatic increase in awards for non-pecuniary loss. While critics have faulted the $100,000 rule for being uncertain and impractical, the same criticisms, in stronger terms, can be levelled at many common law damages rules, particularly those on remoteness and causation. Like the $100,000 rule, these other rules were developed to deal with genuine problems. In my opinion, abolishing the $100,000 rule would simply expose rather than solve the problems to which the rule was addressed.

APPENDIX A

Statistics Canada, Cat. 62-001
The Consumer Price Index, April 1983
Vol. 62, No. 4

Consumer Price Index for Canada. All items (not seasonally adjusted), 1968-1983 1981 = 100

	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Annual Average (1)
1968	37.4	37.4	37.5	37.7	37.7	37.9	38.1	38.2	38.3	38.4	38.6	38.7	38.0
1969	38.8	38.8	39.0	39.4	39.5	39.8	40.0	40.1	40.1	40.1	40.3	40.5	39.7
1970	40.6	40.7	40.8	41.0	41.0	41.1	41.3	41.3	41.2	41.2	41.2	41.1	41.0
1971	41.2	41.4	41.5	41.8	42.0	42.1	42.4	42.7	42.6	42.7	42.8	43.1	42.2
1972	43.3	43.4	43.5	43.7	43.8	43.8	44.4	44.7	44.9	44.9	45.0	45.3	44.2
1973	45.7	46.0	46.1	46.6	46.9	47.4	47.8	48.4	48.7	48.8	49.2	49.5	47.6
1974	49.9	50.4	50.9	51.2	52.1	52.8	53.1	53.7	54.0	54.5	55.1	55.6	52.8
1975	55.9	56.3	56.6	56.9	57.4	58.2	59.0	59.6	59.7	60.3	60.8	60.9	58.5
1976	61.2	61.5	61.7	62.0	62.5	62.8	63.0	63.3	63.6	64.0	64.2	64.5	62.9
1977	65.0	65.6	66.3	66.7	67.2	67.7	68.3	68.6	69.0	69.6	70.1	70.6	67.9
1978	70.8	71.3	72.1	72.3	73.3	73.9	75.0	75.1	74.9	75.7	76.3	76.5	73.9
1979	77.1	77.8	78.8	79.3	80.1	80.5	81.1	81.4	82.1	82.7	83.5	84.0	80.7
1980	84.5	85.2	86.1	86.6	87.6	88.6	89.3	90.1	90.9	91.7	92.9	93.4	88.9
1981	94.6	95.6	96.8	97.6	98.4	100.0	100.8	101.6	102.3	103.3	104.2	104.7	100.0
1982	105.4	106.7	108.0	108.6	110.1	111.2	111.8	112.3	112.9	113.6	114.4	114.4	110.8
1983	114.1	114.6	115.8	115.8									

APPENDIX B

The Impact on Automobile Insurance Premiums

A data base was compiled by randomly selecting the global results from a representative number of bodily injury claims (exclusive of any claims for property damage) from the years 1980 to 1984 inclusive (approximately 17,000 claims per year). These results were arranged by size of loss per year and a model was developed by applying the statistical distribution derived in that way to the total of bodily injury claims in 1982. The majority of claims made in 1982 have been resolved. (That was the primary reason for selecting 1982 as a base year: the results are recent, and the statistical base is stable in comparison to 1983 or 1984, where many more claims are pending.) Assumptions concerning the cost of pending claims, distributed by anticipated size of loss, were also included in the model.

The data base was then adjusted to take into account cost differences since 1982, to arrive at a model for future distribution of loss by size.

I.C.B.C.s records do not distinguish damages for non-pecuniary loss as a component separate from other heads of damages for bodily injury. To determine what impact higher awards for non-pecuniary loss might have on insurance premiums, it was necessary to make certain assumptions.

Non-pecuniary loss is only one item of damages. For serious injuries, it is often only a small pecentage of the total award. For lesser injuries, it may constitute most of the award.

Since there is little empirical data relating to the percentage of a global claim represented by non-pecuniary loss, a series of assumptions were made concerning the average ratio varying according to the size of loss. For lower awards, these assumptions were based upon guesswork. For large awards (those exceeding $300,000) the amount of non-pecuniary loss begins to approach the maximum and the probable percentages can be derived with greater certainty. Four different sets of assumptions relating to the average proportion of non-pecuniary loss to a global damage award or settlement were analyzed.

The analysis consisted of increasing the non-pecuniary loss component of awards or settlements by different factors. It was assumed in one series of tests that all awards for non-pecuniary loss would increase by a fixed amount: multipliers were used to test increases of 50%, 100% and 200%. It was assumed for another series of tests that non-pecuniary loss would increase according to a graduated scale. The current upper limit appears to have little effect on lesser awards for non-pecuniary loss. The impact becomes apparent only for more serious injuries. Consequently, any increase in awards for non-pecuniary loss would be most significant for more serious injuries. In four separate tests, it was assumed that non-pecuniary loss would increase according to a graduated scale of between: (a) 10% to 30%, (b) 10% to 50%, (c) 10% to 120%, and (d) 25% to 200%.

The results from these tests were then used to determine the increase per insurance premium needed to generate a reserve base to cover anticipated claims. The cost varies depending on what claims would be affected by removing the upper limit. If, for example, the upper limit was abolished with respect to future *and pending claims*, then the increase in premium would have to be set to make up the shortfall in the reserve funds calculated for pending claims. Premiums for past years would have been calculated in anticipation of lower awards for non-pecuniary loss. Providing that the upper limit did not apply to pending claims would have a significant impact on future insurance premiums. Similarly, a shortfall could be expected in funds available to satisfy claims arising under unexpired policies whose premiums were calculated based on an upper limit for non-pecuniary loss. The model separated the probable increase in insurance premiums into three components: the cost for pending claims amortized over three years, the cost for claims arising under unexpired policies, and the cost of future claims. The information derived in this way is relevant to two questions. First, what might be the cost of abolishing the upper limit? Second, should any abolition of the upper limit have retrospective or only prospective effect?

Clearly, the assumptions used are rough and ready and results based upon them must be viewed cautiously. The results are, however, based on the best information available to the Commission at this time. In the absence of more detailed statistical information concerning the composition of recoveries based on personal injury claims, the Commission had little choice but to proceed as it did, if it was to provide any guidance at all on the financial implications of reform.

APPENDIX C

Tables Representing the Parameters Tested in the Automotive Insurance Study

Table 1

Percentage of Claim Assumed to be Represented by Non-Pecuniary Loss				
Size of Claim	Assumption A	Assumption B	Assumption C	Assumption D
$ 0 – 10,000	100%	80%	70%	60%
10,001 – 50,000	90%	75%	60%	50%
50,001 – 100,000	50%	45%	45%	45%
100,001 – 300,000	40%	40%	40%	40%
300,001 – 500,000	25%	25%	25%	25%
500,001 – 800,000	20%	20%	20%	20%
800,001 – 1,000,000	15%	15%	15%	15%
1,000,001 – 2,000,000	12%	12%	12%	12%
2,000,001 – 3,000,000	7%	7%	7%	7%
3,000,001 – 4,000,000	5%	5%	5%	5%
4,000,001 – 5,000,000	4%	4%	4%	4%
5,000,001 –	3%	3%	3%	3%

Table 2

Increases in Compensation for Non-Pecuniary Loss Assumed Following Removal of Upper Limit							
Size of Claim	1	2	3	4	5	6	7
$ 0 – 10,000	150%	200%	300%	110%	110%	110%	125%
10,001 – 50,000	150%	200%	300%	110%	110%	120%	140%
50,001 – 100,000	150%	200%	300%	110%	120%	130%	150%
100,001 – 300,000	150%	200%	300%	120%	120%	140%	175%
300,001 – 500,000	150%	200%	300%	120%	130%	150%	200%
500,001 – 800,000	150%	200%	300%	120%	130%	160%	250%
800,001 – 1,000,000	150%	200%	300%	120%	140%	170%	275%
1,000,001 – 2,000,000	150%	200%	300%	130%	140%	180%	300%
2,000,001 – 3,000,000	150%	200%	300%	130%	150%	190%	300%
3,000,001 – 4,000,000	150%	200%	300%	130%	150%	200%	300%
4,000,001 – 5,000,000	150%	200%	300%	130%	150%	210%	300%
5,000,001 –	150%	200%	300%	130%	150%	220%	300%

Present value of compensation for non-pecuniary loss equals 100%.

Table 3

Results

INSURANCE PREMIUM INCREASES REQUIRED IF UPPER LIMIT REMOVED

Table 3 (A)

Increase in Premium Cost of Prospective Application				
	Assumption A	Assumption B	Assumption C	Assumption D
Assumption 1.	$ 50.43	$ 42.94	$ 38.36	$ 34.55
Assumption 2.	100.86	85.88	76.73	69.09
Assumption 3.	201.72	171.77	153.45	138.18
Assumption 4.	11.61	10.12	9.20	8.44
Assumption 5.	13.59	11.97	11.06	10.29
Assumption 6.	20.97	18.77	17.40	16.33
Assumption 7.	43.68	38.94	35.96	33.60

Table 3 (B)

Increase in Premium Cost of Prospective and Retroactive Application (Total)				
	Assumption A	Assumption B	Assumption C	Assumption D
Assumption 1.	$135.01	$122.44	$114.75	$108.35
Assumption 2.	275.06	249.91	234.54	221.72
Assumption 3.	555.14	504.86	474.11	448.47
Assumption 4.	31.49	28.98	27.44	26.16
Assumption 5.	39.68	36.42	35.43	33.60
Assumption 6.	69.06	65.37	63.06	61.27
Assumption 7.	150.90	142.95	137.95	133.98

NOTES TO TABLE 1

1. Each column represents a series of assumptions made respecting the amount of an award or claim represented by non-pecuniary loss.
2. The assumptions are divided by size of award or claim.
3. An example: If a personal injury victim received $25,000 for bodily injuries, it was assumed that the non-pecuniary component of that award would be: $22,500 (column A), $18,750 (column B), $15,000 (column C) and $12,500 (column D) and these assumptions were tested against possible increases following removal of the upper limit (see Table 3).

NOTES TO TABLE 2

1. Each numbered column represents a series of assumptions made respecting the increase in the non-pecuniary component in an award or claim for bodily injury following removal of the upper limit.
2. The assumed percentage increase was applied to the non-pecuniary portion of an award and the increase was added back into the award.
3. An example: Column 1, Table 2 represents one series of assumptions (that non-pecuniary loss would increase by 150% following removal of the upper limit). If the award or claim was $25,000, and 90% of the award ($22,500) represented non-pecuniary loss, then the calculation was performed as follows:

   $25,000 × 90% = $22,500
   $22,500 × 150% = $33,750
   $25,000 − $22,500 + $33,750 = $36,250 (new award)

   (former award − non-pecuniary component + increased non-pecuniary component = new award)
4. These calculations were performed on each division of loss by size to derive the total cost that would result, if the assumptions were correct, of removing the upper limit.
5. Table 3 represents the results obtained from applying the assumptions in Table 2 in connection with the assumptions in Table 1.

NOTES TO TABLES 3 (A) AND 3 (B)

1. Columns denoted by letters indicate which assumptions were used respecting the percentage of a claim assumed to be represented by non-pecuniary loss (see Table 1). Numbered rows indicate the increases in compensation for non-pecuniary loss tested (see Table 2). (Row numbers in Table 3 correspond to column numbers in Table 2.)
2. Use of Table: To determine the assumptions underlying a particular result, refer to the corresponding column letter and row number in Tables 1 and 2. For example, the result in Table 3(A) at column C, row 6 is derived from testing the assumptions respecting percentage of pecuniary loss in column C, Table 1 against the assumptions respecting increases in compensation for non-pecuniary loss in column 6, Table 2.
3. The assumed increases reflected in the results in Rows 2, 3 and 4 in Tables 3(A) and 3(B) are either very high or very low and do not indicate the likely result of removing the upper limit. They merely indicate the broad variation in premium cost that might result from moderate to dramatic increases in awards.
4. Row 6 indicates the results from the assumptions which are probably the most realistic.
5. These results give only an indication of the likely cost of removing the upper limit on awards for non-pecuniary loss.

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